THE CONVEYANCER
AND
PROPERTY LAWYER

No. 3. MARCH, 1937

THE MODERN LAW AGAINST PERPETUITIES.

The Main Points on the Law of Remoteness to be Recollected in Drafting.

By F. E. Farrer.

Alterations effected by the L. P. A., 1925.

(1) The law as to remoteness, at all events as to its application, has been greatly altered as regards England and Wales, but no part of Ireland (*L. P. A.*, 1925, *s.* 209 (3)), by the abolition (*s.* 161) as regards limitations and trusts created after 1925 of the Old Independent Possibility Rule stated below in par. 35, and also by *s.* 163 of that Act.

The effect of L. P. A., 1925, *s.* 163.

(2) But the effect of *s.* 163 is not to alter the modern perpetuity rule itself, but only where that section applies, to vary statutorily the instrument the subject of consideration, by arbitrarily substituting the age of 21 years, for the excess age actually specified in that instrument. This section applies only where the absolute vesting of corpus or income rents and profits of property or ascertainment of a beneficiary or class is by the instrument in question (a) made to depend on attainment of an age exceeding 21 years, and (b) by that particular fact the gift but for the section would be rendered void, and (c) void for remoteness.

(3) Section 163 applies only to instruments *inter vivos* executed after 1925, and notwithstanding the expression "testamentary appointment" in sub-s. 2, it is conceived that the section applies

to the exercise by deed after that date of a special power of appointment conferred by an instrument prior to that date. It also applies to the wills, including wills exercising special powers (sub-s. 2), of a testator dying after 1925 even though the will was executed before 1926. But the section applies only to England and Wales (*s.* 209 (3)). Consequently it is conceived that it cannot apply to the personal estate actually in England, *e.g.* Bank Stock, of a foreign, or a Scots, or an Irish domiciled testator: or in relation to the real or leasehold estate in or mortgages on land in Ireland of an English domiciled testator (*Freke* v. *Lord Carberry*, 16 Eq. 461; Jarman, 7th ed. 3; *Re Moses*, [1908] 2 Ch. 235; *Re Hoyles*, [1910] 2 Ch. 333; [1911] 1 Ch. 179), or land in Ireland subject to a trust for sale to the proceeds of which an English domiciled testator is absolutely entitled or to such proceeds (*Re Berchtold*, [1923] 1 Ch. 192). And equally it is conceived that a testator, whether of English or Irish domicil, cannot get out of the *lex situs*, and so obtain the benefit of the section, by devising his Irish real estate upon trust for sale, the proceeds to be invested in English securities, or land, and that the *lex situs* applying to the Irish real estate itself must attach also to the proceeds of sale thereof. See *Freke* v. *Lord Carberry*, 16 Eq. 461, 467; *Curtis* v. *Hutton*, 14 Ves. at p. 541. The section cannot apply unless all three conditions noted in the last paragraph concur, *e.g.* a testator by will bequeaths in trust for A for life, remainder for all A's children who attain 30, and A after the date of the will predeceases the testator; in such case all A's children must be living at testator's death, and consequently the specifying an age of 30 would never have avoided the gift.

The section does not apply where all the above noted three conditions do concur, but there is also a fourth which *per se* would offend the rule, *e.g.* trust by will to work out testator's gravel pits and, when the gravel is worked out, to sell the land from which the gravel has been worked out, and hold the proceeds for all the children *then living* of A (who survives the testator) who attain the age of 30 (par. 16): for the section when it applies at all merely substitutes notionally in the instrument itself the age of 21 for that of 30.

Statement of the Modern Rule of Perpetuity.

(4) The modern rule of perpetuity invented (par. 31) to restrain within due limits the creation of legal estates in corporeal land (par. 40) raised under springing and shifting uses executory limitations and devises first validated (pars. 29 and 30) by the Statutes of Uses and Devises of H. VIII (all of which are hereinafter called

"executory limitations") now requires—where indeed the rule applies at all (pars. 19, 34, 37, 38)—that an estate or interest in property real or personal (par. 20) must be so limited by the expressions in or the necessary effect of the instrument creating the same, as that such estate or interest as so limited *must* certainly vest in interest (pars. 21, 22, 23) not the least necessarily in actual possession (pars. 21, 22, 23) within, or coincidently with the expiration (*English* v. *Cliff*, [1914] 2 Ch. 376) of, a period consisting of lives—selected in or apparent on the face of the instrument, in being at the time when such instrument, or if the actual creation is by an exercise of a special power, when the instrument creating that special power (par. 11), comes into operation (par. 10), and of 21 years from the death of the last survivor of such lives. Where a gestation actually exists, there is added at the end of the period at least for the benefit of the child *in ventre*, the extra months of his gestation (*Cadell* v. *Palmer*, 1 Cl. & F. pp. 421, 423; *Thelusson* v. *Woodford*, 11 Ves. p. 149; *Villar* v. *Gilbey*, [1907] A. C. p. 149). The 21 years may be in gross, wholly independent of any minority (*Cadell* v. *Palmer*, 1 Cl. & F. 372).

Child in ventre considered living for purpose of the rule.

(5) For the purpose of the rule a child *in ventre* at the date of the instrument coming into operation, born alive in due time afterwards, is a life then in being (*Blackburn* v. *Stables*, 2 Ves. & B. 369; *Thelusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112), and even though it be to his great personal disadvantage so to hold (*Re Wilmer's Trusts*, [1903] 1 Ch. 874; 2 Ch. 411; *Villar* v. *Gilbey*, [1907] A. C. pp. 144, 149). A grandparent can consequently bequeath to all his grandchildren whensoever born who attain 21 (Gray, s. 220; *Re Lodwig*, [1916] 2 Ch. 26).

Number of lives admissible—they need not have a beneficial interest.

(6) The lives need not take any beneficial interest under the limitations (*Thelusson* v. *Woodford*, *supra*; *Cadell* v. *Palmer*, 1 Cl. & F. 372; *Re Villar*, [1929] 1 Ch. 243). Their number, and the limitation is really only for the life of the longest liver of them, is limited only by those as to whom evidence can be adduced as to their existence and deaths (*Thelusson* v. *Woodford*, 11 Ves. 146). Accordingly a testator dying in 1926 validly selected all descendants of Queen Victoria living at his death, in number in the year 1922 above 120 (*Re Villar*, *supra*). The lives must be, it is conceived, human lives, not lives of particular animals (Gray, ss. 228 (a), 905, 906; but see *Re Dean*, 41 Ch. D. 552).

Term of 21 years in gross allowed.

(7) Where no life interests appear in and no lives are selected in or material to the instrument, then a gross period of 21 years is allowed (*English* v. *Cliff*, [1914] 1 Ch. 376 : trust to sell at expiration of 21 years). Bequest, not charitable, to keep a tomb in repair " as long as the law admits ", is good for 21 years (*Re Hooper*, [1932] 1 Ch. 38; *Pirbright* v. *Salwey*, [1896] W. N. 86); but if the above-cited words are omitted see *Re Fossit*, [1934] Ir. 504: but on similar trust " for the longest period allowed by law ", that is to say " till 21 years after the death of all persons living at my death ", the last words apparently cannot be rejected, and the gift is void not for remoteness but for uncertainty (*Re Moore*, [1901] 1 Ch. 936; *Re Villar*, [1929] 1 Ch. p. 250) : see par. 21. The above cases and *Re Dean*, 41 Ch. D. 552, show that in certain cases a trust may be good though there is no *c. q. t.* who can enforce it.

The rule in relation to a class gift.

(8) A gift to a class is entirely void, unless having due regard to when membership of the class is closed every single person, who as the gift is phrased by any possibility that could happen would be entitled to share, must be necessarily ascertained within the period allowed by the rule. It is not sufficient that the maximum number of persons who can possibly share or the maximum number of shares into which the property can possibly be divided must be necessarily ascertained within due limits (*Blight* v. *Hartnoll*, 19 Ch. D. 294; *Re Wood*, [1894] 3 Ch. 381; *Re Bewicke*, [1911] 1 Ch. 116). A testator who left at his death his father and mother both aged 66 him surviving, and whose youngest brother or sister was then aged 32, gave his residuary estate in trust for his wife for life and after her death " for all or any the children or child of my brothers or sisters who shall be living at the death of my wife *or born at any time afterwards* before any one of such children for the time being in existence attain a vested interest " who attain 21 or female attain that age or marry equally. It was impossible to confine the class to those living at the wife's death; and consequently the whole gift was void, for theoretically the parents might have a child born after testator's death, who might have a child who might attain 21 (*Ward* v. *Van der Loeff*, [1924] A. C. 653). Even if only one parent had survived the testator, such parent might marry again with the same consequences—unless indeed on the context it could be held that children of half-brothers or half-sisters were excluded from the class.

Vesting in interest—what is.

(9) To be a vested interest, the claiming beneficiary must be able to show precisely what he is entitled to receive. Thus the usual discretionary trust, enduring during the lives of children unborn at the date of the instrument coming into force, will be void (*Re De Sommery*, [1912] 2 Ch. 622; *Re Blew*, [1906] 1 Ch. 624; *Re Coleman*, [1936] 1 Ch. 528. In *Re Whiteford*, [1915] 1 Ch. 347, a mother under special power contained in her marriage settlement appointed on her death two-fifths of the property to trustees out of the income each year to make up for one son together with his other resources £200 p. a. and apply same for his benefit for his life or till he recovered, and to pay the residuary income of such 2/5ths till then amongst his brothers: the whole appointment of the 2/5ths was void. See also as to vesting in interest of remainders *infra*, pars. 32, 33.

Time from which the rule runs.

(10) In case of a will, the period allowable for vesting in interest runs from testator's death; in case of a deed from execution of the deed :— in either case with the exception that when the instrument exercises a *special* power, time runs from the date of the coming into operation of the instrument conferring such special power, not from date of exercise of that power.

In case of exercise of a special power.

Where an infant's marriage settlement confers a special power, and is afterwards confirmed, the period runs from the settlement, not the confirmation deed (*Cooke* v. *Cooke*, 38 Ch. D. 202); in other cases of a confirmation deed the case might vary : see *Morgan* v. *Gronow*, 16 Eq. 1; *Re Ramadge*, [1919] 1 Ir. 219.

In case of exercise of a true General Power.

A general power to a person to appoint to whom he pleases by deed or will confers such potentiality of making the property his own on the donee of the power, that the period runs from the exercise not the creation of the power (Lewis 483, 487; Farwell 325; *Re Fane*, [1913] 1 Ch. 404; *Re Gordon and Adams*, [1914] 1 Ch. 110). So, as seems settled in England and Ireland, of a general power to appoint by will only: Farwell 327. *A fortiori* where the power is to appoint by deed only: *Re Phillips*, [1931] 1 Ch. 347.

A power to two or more to appoint as they think fit is a general power for the purpose of the rule.

A power to X to appoint generally but with the consent of Y, will be general or special for the purpose of the perpetuity rule, according to whether on the true construction Y has merely a bare veto on an appointment, or is under duty to consider the beneficial interests which X proposes to appoint, and the interests of those who take in default of appointment (*Re Dilke*, [1921] 1 Ch. 341; *Re Phillips*, [1931] 1 Ch. 347); if he has such duty the power is special: *Re Watts*, [1931] 2 Ch. 302. There can indeed be for the purpose of the perpetuity rule a power which strictly is neither general nor special, *e.g.*, a power to appoint to any one except a specified individual or individuals, and the excepted person may be the donee of the power: *Re Park*, [1932] 1 Ch. 580; compare *Litt.*, s. 361: such a power would we conceive be a special power for purpose of the perpetuity rule.

If A himself has only a *special* power of appointment, and appoints to B an object of that power for life, giving B a general power to appoint by will *only*, B's power, if B was not in existence at the creation of A's power, is void as arising exercisable at too remote a period (*Wollaston* v. *King*, 8 Eq. p. 170; *Morgan* v. *Gronow*, 16 Eq. p. 9): but if B was then in existence it cannot be too remote (*Slark* v. *Dakyns*, 10 Ch. 35; *Morgan* v. *Gronow*, 16 Eq. p. 9; Farwell 335); nor is it a void delegation of A's power, as since A can give B the absolute interest so he can give him a less interest (*Slark* v. *Dakyns*, *supra*): A can in either case appoint to B a general power exercisable by deed or will (Farwell 334): if A appoints to B and purports to give B a general power of appointment by deed or will with consent of X, not an object of A's power, this power is void not on ground of remoteness, but as an attempt to delegate discretion to X (*Webb* v. *Sadler*, 8 Ch. 427), *a fortiori*, if A purports to give B a special power to appoint to a non-object of A's power (*Carr* v. *Atkinson*, 14 Eq. 397).

Exercise of special power is read with not into the instrument creating that power.

(11) An exercise of a *special* power of appointment is read with, but not into, the instrument conferring that power and having regard to the facts at time of exercise. Thus though a remainder (par. 32) had to be created at common law simultaneously with the particular estate, yet after the statutes of H. VIII had validated powers of appointment, an exercise of a special power was read with the instrument creating that power, so as if possible to create a remainder or contingent remainder (*Hole* v. *Estcourt*, 2 Keen 444; 4 M. & Craig 187; *Whitby* v. *Mitchell*, 42 Ch. D. at p. 498;

44 Ch. D. at p. 87; *Symes* v. *Symes*, [1896] 1 Ch. 272; *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783; *Davy* v. *Clarke*, [1920] 1 Ir. 137). The exercise of a general power did, and still subject to *S. L. A.*, 1925, does put an end to the settlement creating the power as from the time of the exercise taking real effect (*Re Gordon and Adams*, [1914] 1 Ch. 110).

A mother had by will special power of appointment to issue, she dying in 1918 appointed to her son, born after testator's death, but who at her death had attained the age of 19 years, if her son should attain the age of 25 years : the appointment was of course held good (*Re Paul*, [1921] 2 Ch. 1; Farwell 327). *L. P. A.*, *s.* 163, cannot apply to such a case (par. 3).

Prior limitation void for remoteness; later limitation dependent thereon void also.

(12) If a limitation in real substance prior to a later limitation is held void for remoteness, then a later limitation dependent on and not merely subsequent to the prior void limitation is also held void, though in itself standing alone it would be perfectly good (*Re Backhouse*, [1921] 2 Ch. 51) (so also on the old possibility rule, as to which see par. 35; *Re Mortimer*, [1905] 2 Ch. 502): and this applies though the later limitation is for life only to a person already in existence (*Re Thatcher*, 26 Beav. 365; *Re Hewett*, [1915] 1 Ch. 810; *Re Ramadge*, [1919] 1 Ir. 219), though Gray, s. 252, strenuously objects. The reason is that the donor assumes the validity of the prior limitation, and does not intend the later to take effect, till the exhaustion on that basis of the former ([1893] 3 Ch. p. 57; [1915] 1 Ch. p. 816; [1936] 1 Ch. p. 313). The effect of *s.* 163, *L. P. A.*, 1925 (see pars. 2 and 3) may sometimes be to validate the prior limitation which if raised before 1926 would have been void, and with such validation, the subsequent limitations also.

But for this position to apply the later gift must be dependent on and not merely subsequent in remainder on the prior void gift. Thus there was a discretionary trust during the whole of the life of any widow whom the testator's son might leave (see par. 9) and after her death a trust for that son's children, the latter being wholly independent of the prior gift was held good: *Re Coleman*, [1936] 1 Ch. 528.

But Priority of Limitation is not governed by mere sequence of words.

(13) And to have the effect noted in the last paragraph the void limitation must be prior in substance, not merely prior in

the order of sequence of words: see an instance, *Re Canning*, [1936] 1 Ch. 309. Thus where the limitations were to a lady a spinster at testator's death for life, then to any husband she might marry for life, then for the issue as they or the survivor should appoint, in default for the children: the joint power, and the lady's survivorship power was good, but the husband's survivorship power was void (cp. *Re Garnham*, [1916] 2 Ch. 413); but that did not invalidate the limitations in default of appointment, limited as defeasible by exercise of such power (*Re Abbott*, [1893] 1 Ch. 54; Farwell 132): compare the cases where the power is void for nondelegability (*Carr* v. *Atkinson*, 14 Eq. 397; *Webb* v. *Sadler*, 8 Ch. 427; *Williamson* v. *Farwell*, 35 Ch. D. 128): compare also where the trust for sale is itself too remote, but the class to take the proceeds of sale is ascertained in due time (par. 16).

Where there is a term limited to trustees *in priority* to an estate tail, upon trust to raise sums on the failure of that estate tail, those trusts are too remote, because, the term having priority to the estate tail, a bar of the estate tail would not bar the trusts (*Case* v. *Drosier*, 2 Keen 764; 5 M. & Cr. 246; *Sykes* v. *Sykes*, 13 Eq. 56 (see par. 37)).

A good gift not affected by subsequent condition too remote.

(14) A subsequent too remote condition or gift over leaves the prior valid gift absolute (pars. 22—24). If a special power of appointment in a marriage settlement be so exercised; as to give a daughter of the marriage a life interest restrained from anticipation, the gift is good, but the restraint on anticipation is void (Farwell 338, 339; Gray, ss. 434 *et seq.*); or as to appoint to a son in fee but if he has no child who attains 21 then over, the gift stands absolute (*Re Brown and Sibley*, 3 Ch. D. 156; Farwell 349).

The modern rule in relation to creation of Powers.

(15) We now deal with the modern rule in relation to the initial creation of trusts and powers. A power, though general, to appoint, which in itself cannot arise as exercisable, except on too remote an event, or to appoint to a class no member of which can possibly be ascertained except on too remote an event, will be void in its creation though given to a single living and ascertained donee (*Bristow* v. *Boothby*, 2 S. & St. 465 (as to this case see Farwell 130); *Morgan* v. *Gronow* (par. 10); *Blight* v. *Hartnoll*, 19 Ch. D. 294); *a fortiori* when such power is given to a not then ascertained though single donee (*Re Abbott*, [1893] 1 Ch. 54 (see par. 13)).

Trusts for sale and other powers arising on too remote an event.

(16) The following are instances of trusts or powers void in creation. Trust in the trustees for the time being to sell; when testator's gravel pits are worked out, which in normal working would have been 4 years from his death (*Re Wood*, [1894] 3 Ch. 381); when existing incumbrances have been discharged out of surplus rents—though normally they would be discharged in a few years (*Blight* v. *Hartnoll*, 19 Ch. D. at p. 300; *Re Bewicke*, [1911] 1 Ch. 116). In each of the above three cases the trusts of proceeds were for a class living *at the time of the sale directed*, hence the trusts of the proceeds of sale were also void. But had the trusts of proceeds been for a class ascertained in due limits, then that class would have been entitled in equity to the land, the trust for sale only being void (*Goodier* v. *Edmonds*, [1893] 3 Ch. 555; *Re Daveron* (*ib.*) 421; *Re Appleby*, [1903] 1 Ch. 565); cp. *Re Lodwig*, [1916] 2 Ch. 26, where the trust was to divide amongst all the grandchildren of testator when the youngest reached 30, and it was held that the beneficial interest of each was vested, not contingent on his being living at that date.

Further instances.

(17) Further instances are: where a settlement gave a life interest in an annuity charged on the land, to any husband whom a spinster tenant for life might marry, an unlimited power of leasing in the trustees was held void (*Re Allott*, [1924] 2 Ch. 498; see especially p. 514). But what looks at first sight perhaps like a single trust or power may be really two.

Divisibility of a trust or power.

An imperative trust to sell on death of survivor of a spinster and any husband she may marry, with discretionary power to sell earlier, the imperative trust is bad, the discretion to sell earlier good (*Re Garnham*, [1916] 2 Ch. 413): discretion to pay all or any part of capital or income to E (who survived testator) or to apply for his or his wife's or his children's benefit, the power to pay E is good, that to apply is bad—the application not being on construction limited to E's life, and not requiring equal division (*Re De Sommery*, [1912] 2 Ch. 622; *Re Blew*, [1906] 1 Ch. 624; *Re Whiteford*, [1915] 1 Ch. 347).

On rare occasions it might be possible to split the power to do the same thing into two distinct powers, one vested in the original trustees solely which might be good as impliedly limiting the exercise by them to their lives, the other in all succeeding trustees; see *Re De Sommery*, *supra*; Gray, s. 480; Farwell 132: but it

would be difficult so to split up an imperative trust for sale in this way (*English* v. *Cliff*, [1914] 2 Ch. p. 385).

Power is not void in creation because on the words remote interests might be created on its exercise.

(18) But the fact that on the words as drawn of a power to be itself exercised in due time the donee might but need not necessarily exercise it in favour of too remote objects, or on too remote a contingency, will not invalidate the creation of the power (*Re Fane*, [1913] 1 Ch. pp. 411, 414; *Re De Sommery*, [1912] 1 Ch. 622). This moreover is proved by the everyday marriage settlement which authorises the spouses or survivor to appoint to remote issue at such times as thought fit: and by the well-established rule that unlimited powers of management or the like in a valid settlement are good because they must cease when the property comes home (Gray, s. 490 *et seq.*; Farwell 129). Moreover this question as to powers of management, etc. is now of little practical importance, having regard to the wide powers statutorily given by *S. L. A.*, 1882 to 1890, and *S. L. A.*, 1925, which of course being so given could never offend the rule (par. 19).

Those Acts, *S. L. A.*, 1882, *s.* 57, and *S. L. A.*, 1925, *s.* 109, moreover authorise the conferring of additional or larger powers and it is conceived that thereby the Legislature sanctioned, wholly regardless of the perpetuity rule, such powers as attached to a valid settlement; and notwithstanding that *S. L. A.*, 1925, *s.* 3, keeps a settlement alive as such, long after it would have ceased as such before 1926. *Re Allott*, [1924] 2 Ch. 498, does not seem to invalidate such unlimited additional powers. Why should a power in a marriage settlement of appointment in favour only of *any* of the issue who attain 25 be void in creation? The class appointable to is of course limited: but it does not necessitate too remote an appointment. Why should not the spouses appoint to such (if any) as attain that age within 21 years from the death of the survivor of the spouses? See *Re Paul* (par. 11). *Davy* v. *Clarke* (see par. 34) has observations that have some bearing. Even if the power were to appoint to all or any who attain 25, why should not the power be severable—bad as to all, but good as to any who attain that age in due time?

The wholly unnecessary *dictum* of Fry, J., in *Blight* v. *Hartnoll*, 19 Ch. D. at p. 301 is far too wide (Farwell, pp. 168, 169): without doubt parents, under their marriage settlement ordinary power, can appoint to a spinster daughter for life remainder to a class of her children composed as follows, of such of them as are born before the death of the survivor of the appointors and

attain 21, of the others born within 21 years from the death of such survivor at birth.

The rule only a branch of Public Policy.

(19) The modern rule of Perpetuity is a branch of Public Policy. What the Legislature has ratified in a particular case, or authorised generally cannot be objectionable (*Manchester Ship Canal* v. *Manchester Racecourse*, [1900] 2 Ch. 352; [1901] 2 Ch. 37). Surely the climax of absurdity was reached in *L. P. A.*, *s.* 121 (6) and *C. A.* 1911, *s.* 6 (1). Trusts to discharge incumbrances are not against public policy (*Re Stamford and Warrington*, [1912] 1 Ch. p. 368). A power to release, or reduce in burden, restrictive covenants cannot be objectionable (*Whitehouse* v. *Hugh*, [1906] 1 Ch. 253; 2 Ch. 283 : see the argument, p. 257). Restrictive covenants immediately imposed for one property over another are not objectionable (Gray, s. 279; *Mackenzie* v. *Childers*, 43 Ch. D. p. 279); they constitute a present negative equitable easement over the servient for benefit of the dominant tenement. Restrictive covenants might no doubt be imposed for benefit of relevant land which a particular man himself (*Keate* v. *Lyon*, L. R. 4 Ch. pp. 226, 227), but not which he or his heirs (Gray, ss. 314, 315) may hereafter acquire; unless it could be held that the right was severable, and good as to him during his life see Farwell 132. Covenants for renewal of leases or options to renew leases though not on the precise terms of the original lease are not within the rule (Gray, s. 230; *Rider* v. *Ford*, [1923] 1 Ch. 541, p. 547; *Woodall* v. *Clifton*, [1905] 2 Ch. pp. 263, 265, 279). Imperative trusts for sale immediate or arising at not too remote a period (pars. 7, 16) are of course valid; they convert the land to personalty and remain effective till put an end to by the beneficiaries (*Biggs* v. *Peacock*, 20 Ch. D. 200; 22 Ch. D. 284; *Tweedy* v. *Miles*, 27 Ch. D. 315; *Swaine* v. *Denby*, 14 Ch. D. 326; *L. P. A.*, 1925, *ss.* 23, 25 (4)).

The rule avoids only interests in property, not contracts.

(20) The rule avoids only the creation of too remote interests in property. It has no application whatever to the personal liability of the contractor whether in damages, or as we conceive where the original contractor still retains the land, in positive specific performance (*S. E. R.* v. *Associated Portland, etc.*, [1910] 1 Ch. 12; *Witham* v. *Vane*, Challis, 2nd ed. 401; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; *Mackenzie* v. *Childers*, 43 Ch. D. p. 279). *A fortiori* in negative specific performance as by injunction see *Sharke* v. *Durrant*, 55 Sol. Jo. 443 (par. 39); *Manchester, etc.* v. *Manchester*, [1900] 2 Ch. at p. 366; [1901] 2 Ch. 37.

Thus a lease for 30 years granted the lessee an option at any time during the lease, on notice, to purchase the reversion in fee, this was held too remote—cp. *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Rider* v. *Ford*, [1923] 1 Ch. 541—and specific performance was refused against *the devisee* from the lessor of the reversion, while damages for such devisee's refusal to sell were given against the surviving executor of the lessor (*Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532). In *Rider* v. *Ford*, [1923] 1 Ch. 541 the point that the plaintiff the contractor still held the reversion was not taken, and the defendant's council admitted (p. 546) that unless the option to purchase the fee could be limited to defendant's life the defendant must fail : he had not elected to purchase, and had not counterclaimed specific performance. All the Judges of C. A. in *S. E. R.* v. *Associated*, [1910] 1 Ch. 12, but especially Farwell, L.J., at p. 34, seem clear that positive specific performance can go against the original covenantor who still retains the land : cp. *Borland* v. *Steel*, [1901] 1 Ch. 279, 289. Why not? the moment the option is exercised a positive contract for sale is formed, and the grantor of the option becomes trustee of the land for the grantee, subject to the latter performing his part of the contract. Gray's objection (s. 330) seems unfounded.

The rule has no application to the falling into possession of, or determination of, estates duly vested in interest.

(21) The rule applies only to the vesting *in interest* of an estate or interest. It has no application whatever to its falling into actual possession or to its determination (Lewis 173, 511; *Wainewright* v. *Millar*, [1897] 2 Ch. p. 261; *Re Gage*, [1898] 1 Ch. 498; *Mann* v. *Land Registry*, [1918] 1 Ch. p. 209; *Re Cassel*, [1926] Ch. p. 368; *Re Chardon*, [1928] Ch. p. 468; Gray, ss. 232, 279; *Re Villar*, [1929] 1 Ch. p. 250); *Re Coleman*, [1936] 1 Ch. p. 533. Leading instances are as under.

Trust in equity of land for A a bachelor for life, remainder for his sons successively for life, remainder to B for life tail or fee : this remainder is perfectly good—but the rule never applied to legal remainders (par. 34).

Reservation for accommodation purposes of his land on grant of a long strip thereof to a railway for its line, of easement of making a tunnel under the line to the grantor and his heirs to be exercised whenever desired, creates a perfectly good present easement (par. 39) : *S. E. R.* v. *Associated, etc.*, [1910] 1 Ch. pp. 19, 24, 25.

A bequest of long lease term in settlement, trust out of income of residue to pay all rent rates and other outgoings on the lease :

this confers a presently vested valid relief to those interested in the lease under the bequest, not strangers, *e.g.* purchasers of the lease, and is good, regardless of the fact that the amount requisite will vary from year to year (*Re Cassel*, [1926] 1 Ch. 358, explaining *Kennedy* v. *Kennedy*, [1914] A. C. 215).

A landlord whose lessee has a lease having still 30 years to run, grants him a reversionary lease, this confers a present vested legal right falling into possession later (*Mann* v. *Land Registry*, [1918] 1 Ch. p. 209). As to creation since 1925 of reversionary leases see *L. P. A.*, s. 149 (3). So, trust for A, who survives testator, for life, remainder to pay the income to A's children *equally* till the youngest attains 23 (*Re Blew*, [1906] 2 Ch. at p. 629). And see *Re Coleman* stated at end of par. 12.

Trust of income of personal estate equivalent to fee terminable in real estate is good.

(22) Consequently a trust of income for a parson and his successors *until* the parson or his successors charge pew rents in the church (*Re Randell*, 38 Ch. D. 213; *Re Blunt*, [1914] 2 Ch. 767) or for a cemetery company so long as a tomb (not a charitable gift) is kept in repair (*Re Chardon*, [1928] Ch. 464) are perfectly good; seeing that the interest is presently vested and the termination is due to the inherent weakness of the very original gift, and that on the event the gift dies a natural death.

Of course no limitation over on such a termination would be valid. But express words which on such termination would carry over the property to exactly the same intent as the law without those words would do, *e.g.* words directing the gift to fall into residue, are looked on not as void limitations over, but merely as indicating how in that event the law will deal with the property (*Re Chardon*, [1928] Ch. 464, 470; *Re Randell*, 38 Ch. D. 213; *Re Blunt*, [1904] 2 Ch. 767). In A.D. 1738 a residuary devise would not have carried a ceased specific devise in terminable fee (*A.-G.* v. *Pyle*, 1 Atk. 435).

Terminable Fee in Real Estate is good.

(23) For the above reason alone (quite independent of whether the modern rule of perpetuity invented to meet executory limitations validated by the Statutes of H. VIII could ever be applied to terminable fees raised at common law: see *A.-G.* v. *Cummins*, [1906] 1 Ir. 406, at p. 408) the rule can have no application to a terminable fee in real estate (*A.-G.* v. *Cummins*, *supra*; *Re Chardon*, [1928] Ch. p. 469).

The reader will find a list of such terminable fees in Challis,

2nd edition (the last brought out by that fine lawyer), pp. 228—233—to which he can add *Re Leach*, [1912] 2 Ch. 422, devise of equitable fee to A till A assigns or goes bankrupt, (*A.-G.* v. *Cummins*, *supra*) conveyance of quit rents by King Charles II to A and his heirs till the King or his successors pay a lump sum. Professor Gray (ss. 31 to 37, 774—788) on the false premiss (s. 31) that reverter to the donor could be only of (a) corporeal land and (b) as to that only to the lord—argues that the statute Quia Emptores prohibited the future creation of terminable fees.

The answer seems to the writer clear, *viz.*, that though the donee on terminable fee holds of the donor's lord, see the passages from Coke and Fearne cited in the writer's Article on "Reverter to Donor of Terminable Fee", 50 L. Q. R. pp. 35, 36 : yet—the statute does not preclude reverter to the donor—moreover that there was reverter to the donor even of the fee simple *absolute* held at its dissolution by a dissolved Corporation (see the writer's Article "Reverter to Donor of Dissolved Corporations Fee", 49 L. Q. R. 240 (impugned by Mr. Hughes in 51 L. Q. R. 347 and there at p. 361 replied to by the writer) and that there was reverter also to the donor of other absolute gifts (50 L. Q. R. pp. 37, 38; 51 L. Q. R. p. 365). A terminable fee in English land can no longer be a legal estate : but it will be a good equitable estate (*L. P. A.*, *s.* 39, 1*st Sch.*, *Part I*; *S. L. A.*, 1925, *s.* 1 (1) (ii) (c), (5) (b), *s.* 20 (1) (iii), *s.* 117 (1) (iv), *s.* 75 (5), and *s.* 118, 4*th Schedule*, *clause* 14).

On some such *terminable* fees there can be a valid gift over, the perpetuity rule obviously not applying, as in the former common marriage settlement of real estate where the man conveyed his land to feoffees and their heirs to his use in fee till solemnisation of the intended marriage and thereafter to the required uses of the settlement, or as where a testator devised in trust in fee for A till A assigned or went bankrupt, and then over (*Re Leach*, [1912] 2 Ch. 422) : in those cases if the proposing husband dies without having solemnised the marriage, or A dies without having gone bankrupt, etc., his fee becomes absolute, and the gift over must take effect, if at all, in his life (Challis, 2nd ed. 227).

The gift in *Re Leach*, *supra*, being only *till* A's assignment or bankruptcy, gave A only a terminable fee, and consequently the gift over on A's alienation was not repugnant—a point left open in *Re Machu*, 21 Ch. D. at pp. 842, 844,—in spite of an unnecessary *dictum* in *Re Dugdale*, 38 Ch. D. at p. 181. But had the gift been in inception *absolute* to A followed by an avoiding condition subsequent or gift over such condition or gift over would have been void as repugnant to the absolute estate first given

to A (Littleton 360; Co. Litt. 223 (a); Shep. T. 129, 130; *Re Dugdale*, 38 Ch. D. 176 (see also par. 24)), the donor or testator retaining on that original absolute gift no further interest in the property: note Coke's words, Co. Litt. 223 a.

We observe that the property in *Re Leach* being that of the testator, and not originally A's own property, there was no fraud on the bankruptcy law, in the testator limiting it until A's bankruptcy (*Lockyer* v. *Savage*, 2 Strange 947; *Ex parte Hinton*, 14 Ves. 598).

But a condition subsequent restraining alienation of a fee in possession by the original donee himself to any particular specified individual is good and not repugnant: *Litt. s.* 361; *Co. Litt.* 223 (*b*); *Re Macleay*, 20 Eq. 186.

In the last cited case a condition that the original donee should never sell out of the family was held good as not being repugnant, of course no perpetuity there arose.

Whether or not *Re Macleay* is sound law, a condition giving right of pre-emption in favour of X of a fee in possession given to Y, though the right be limited as to endure only during the life of Y or another living person if it be at such undervalue as in effect to preclude an outside sale is void as repugnant: *Re Cockerill*, [1929] 2 Ch. 131; *Re Ropner*, 26 Ch. D. 801.

There may however be a valid forfeiture clause on the alienation by the donee before it falls into possession of a remainder in fee given to him: *Re Forder*, [1927] 2 Ch. 291: but where the forfeiture clause applies without distinction both to fee in possession and fee in remainder so given, the Court cannot sever the forfeiture clause, so as to make it good as to the alienation of the remainder while still in remainder: *Re Smith*, [1916] 1 Ch. 36.

Personalty given in the first place absolutely with remote defeasance clause—the defeasance is void, the gift absolute.

(24) Where the interest in personalty is by the very terms of the gift in its *inception* either expressly or on true construction given in perpetuity, a defeasance clause upon an event unless limited to take effect within due limits will be absolutely void. Here the original gift does not die a natural death of its own inherent inanition, but were indeed the defeasance clause valid might be said to die a violent death (*Re Talbot*, [1933] Ch. 895; *Re Bowen*, [1893] 2 Ch. 491; *Re Peel*, [1921] 2 Ch. 218).

Fee simple in real estate subject to defeasance by common law condition.

(25) Does the modern rule apply to a fee in inception of gift absolute and not terminable but made defeasible on entry for

breach of a common law condition? Such a fee will still remain in English real estate a legal estate by reason of the 1926 amendment to *L. P. A.*, 1925, *s.* 7 (1), and created after 1925 in English real estate such a fee seems clearly so subject (*s.* 4 (3)). A terminable fee differs *toto cœlo* from a fee defeasible, the former perishes on the event from the inherent weakness of the gift itself (Co. Litt. 214 (b); Challis, 2nd ed. 233, 234), from that moment the donee remaining in is a trespasser. The fee defeasible remains lawful and good notwithstanding the breach of the condition of defeasance (except only in the very special case put by Littleton, ss. 349, 350) unless and until the person entitled to enforce the condition shows, as the law requires, his concluded election to take advantage of the breach, by entry, or its equivalent writ for possession (Litt. s. 351; *Re Evans' Contract*, [1920] 2 Ch. 469), or where entry is not physically possible, claim (Co. Litt. 214 (b), 218 a): the donee till then remains in lawful possession, is no trespasser, and consequently free of demand for mesne profits (*Elliot* v. *Boynton*, [1924] 1 Ch. 236): cp. *Magdalen Hospital* v. *Knotts*, 4 A. C., at p. 334.

Conflicting authorities on this point.

The English judicial authorities in favour of the rule applying are *dicta* of North, J., and Baggallay, L.J., in *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. 586 (where the right of entry must have been reserved, though the report does not say so, to the vendor's vendors *and their heirs* (a right expressly reserved to A ends with his life: Litt. s. 337); *Hollis and Hague's Contract*, [1899] 2 Ch. 540—where Byrne, J., also held that a common law condition of defeasance on entry could be attached to a fee raised under the Statute of Uses,—and *Re Da Costa*, [1912] 1 Ch. 337. See also *Smith* v. *Colbourne*, [1914] 2 Ch. p. 541; *Re Macleay*, 20 Eq. 190. The North Irish C. A. in *Walsh* v. *Wightman*, [1927] N. Ir. R. 1 has expressed a contrary opinion, and in *A.-G.* v. *Cummins*, [1906] 1 Ir. 406 (itself however a case of a *terminable* fee) the whole reasoning of that great lawyer Palles, C.B., is against the rule applying to limitations raised at common law.

Reasons for saying that as a practical matter the rule applies.

(26) In this state of the authorities, the writer submits, that as a practical matter the rule does apply—not that a rule invented to meet executory legal limitations first validated by the Statutes of H. VIII (par. 31) can *directly* apply to common law limitations —but because, with the exceptions noted below, he can find no instance *of an unlimited right of entry for condition broken being valid before those Statutes*, when fees defeasible by condition were

of everyday occurrence. With these exceptions in all the instances given in Littleton's and Perkins, Chapters on Estates on Condition, both of whom wrote before these Statutes, the condition giving right to the entry must have been broken or performed at an early day named, or within the life of a living person, or if there is any other case a reasonable time only would have been allowed for performance of the condition (Perkins, s. 787). Hence there was before these Statutes some undefined limit to entry for the breach of the condition, which may now therefore be taken as the period allowed by the modern rule.

Fees defeasible by condition in effect superseded by Statute of Uses.

(27) Before these Statutes these fees defeasible were common : the conditional limitation over validated by these Statutes, practically put an end to them, except in the instances below. A man at common law could not take an estate under his own grant (Perkins, ss. 704, 705; *Maud's Case*, cited 1 Leonard, p. 198; Preston, Estates, I, 292). Consequently before these Statutes one wishing to make a legal marriage settlement, unless he would go to the expense of a fine sur grant and render, which was equivalent to feoffment and re-enfeoffment, had to enfeoff friends and their heirs on condition that they or their heirs would at request re-enfeoff to the required limitations. If the friends refused, the only remedy was for the man or his heirs to enter for the breach of the condition : this really was purely theoretical : we may be certain that the requisite deeds were executed and that livery of seisin each way according to the tenor was made on the same day : anyhow the request as a practical fact would have been made at once.

Exceptional unlimited rights of entry.

(28) With the exception noted in the last clause, the only unlimited right of entry for condition broken which the writer has found, are, the right to a man *and his heirs* to re-enter as of his old estate on land which he grants in consideration of a perpetual rentcharge (Litt. s. 325; Gilbert, Rents, 135 : see *Sykes* v. *Williams*, [1933] Ch. 285); or to enter till satisfied the arrears, his entry in this case conferring only a chattel interest (Litt. s. 327; Gilbert, Rents, 137). Both these rights have been repeatedly recognised by the Legislature (*Statute of Uses*, 27 *H. VIII*, *c.* 10, *s.* 5; *L. P. A.*, 1925, *s.* 4 (3), and the former by *C. A.*, 1881, *s.* 14 (3); *L. P. A.*, 1925, *s.* 146 (5) (a), and the latter by *C. A.*, 1881, *s.* 44; *L. P. A.*, *s.* 121). From the very nature of the rentcharge arising payable at intervals for ever, an

unlimited entry was obviously necessary. Lewis indeed at p. 615 suggests many early cases of unlimited entry but the only actual authority he cites is Co. Litt. 214 b—and that authority he mistakes. Coke's words are " as if I enfeoffe another of an acre . . . upon condition that if mine *heir* pay to the feoffee . . . that he and his heir shall re-enter this condition is good . . . " Coke is speaking of his " heir " in the singular, who must be in being at Coke's death (*Re Amos*, [1891] 3 Ch. 159), not of a succession of heirs. A condition for re-entry on a lease for a term of years however long is clearly good. Moreover that position has been recognised by the Legislature (*C. A.*, 1881, *s.* 65 (1); *C. A.*, 1882, *s.* 11 (1); *L. P. A.*, *s.* 153 (1) (2)).

Of course where any particular Statute gives or authorises unlimited re-entry there can be no question (par. 19).

The Perpetuity Rule as we know it a relatively modern invention.

(29) Executory *Legal* Limitations of corporeal land were simply void at common law, and were first validated as legal estates by the Statutes of Uses and Devises of H. VIII. Before these Statutes the only legal devise possible was of land by custom deviseable.

Executory Limitations were void at common law.

Executory devises in a will of land deviseable by custom were void (Perkins, ss. 506, 566, 567; Brooke, Grant 133; Litt. s. 169). *A fortiori* executory limitations raised by deed (Brooke, Grant 133; Devise 4; Perkins, ss. 568, 566, 704; Brooke, Done and Remainder 35; *Richel's Case*, Litt. ss. 720—723; *Colthurst* v. *Bejushin*, Plowd. 21)—the point is further established by the fact already then well established, *viz.* that a legal limitation by way of contingent remainder—*i.e.* a limitation that carried a mere chance that it would vest as an *estate*—was good only if it so vested in fact during or *eo instante* with the expiration of the particular *estate* on which it depended (Perkins, ss. 52, 56; Fitz. Abr. Feffement 99; Brooke, Done and Remainder 37, 6, 22, 25, 42)—all authorities before the date of the Statute. And of course such executory limitations remained void after the Statute of Uses when raised in deeds that could not be held to operate under the Statute.

The common law power of sale in executors no true exception.

(30) It is true that a man having land customarily deviseable could devise that his executors (his personal representatives) should sell the land *for the good of testator's soul* (and paying testator's debts was much for that good) without giving them any estate (Litt. ss. 169, 383). But this when truly understood proves

the rule stated in par. 29. The "Heart" here came into conflict with the "Head", and its deeper wisdom practically won, but the "Head" saved as it were its face on the fiction that the purchaser came in direct under the will. See the authorities cited in the writer's article, Sol. Journal, Vol. 67, p. 697 : which also see for other instances of the enormous influence of the doctrine of Purgatory on our law. There was indeed the doubtful exception of an estate being enlargeable by performance of a condition, in effect denied by Littleton, ss. 349—351, on which see Coke, Co. Litt. 217—218 (a), in his retirement and old age studying Littleton. And the fact that if one had granted Blackacre and Whiteacre to A for life, and afterwards granted the reversion of one of them, not specifying which, to B, the grant would be good provided B made his election during A's life and A attorned tenant of the estate so selected. See the writer's article on "Grant and Exception made good by Election", The Conveyancer, vol. 13, 108—112, 117—122.

Origin of the modern rule of Perpetuity in the Statutory Validation of executory limitations.

(31) Historically, therefore, and on all authority the modern rule of perpetuity was invented to meet executory *legal* limitations in corporeal land validated by the Statutes of Uses and Devises of H. VIII reign. See passages from Fearne cited in the writer's article that "The modern rule of Perpetuity never applied to legal contingent remainders"; 51 L. Q. R. 668, at pp. 673—675; *per* Lush, L.J., in *Abbiss* v. *Burney*, 17 Ch. D. at p. 233; Lewis, p. 408; Sugd. Gilbert, Uses, 260, 261 n.; *per* C. A. in *Whitby* v. *Mitchell*, 44 Ch. D. 85; Challis, 2nd ed. 183; Preston, Abstracts, II, 148; *per* Butler Fearne, 565 n.; *per* Bayley, J., delivering the Judges' opinion in *Cadell* v. *Palmer*, 1 Cl. & F. at p. 412; *per* Willes, C.J., there cited at p. 414; *per* Palles, C.B., in *A.-G.* v. *Cummins*, [1906] 1 Ir. at p. 408.

And it took about 300 years from the Statute of Uses till *Cadell* v. *Palmer* to settle exactly and beyond all cavil the exact ambit of the modern rule. The fact of course that executory limitations were so validated by the Statute of Uses, which adjudged *cestui que use* to hold in law for such like estates as they have in the equitable use, proves that before the Statutes the Lord Chancellor did not hold all executory limitations of the equitable use to be bad.

Definition of a Remainder and Contingent Remainder.

(32) For a limitation to constitute an immediately vested remainder it is essential that it be limited (a) upon a particular

estate of freehold, *i.e.* for a life or lives, or since *De Donis* on a particular *estate* tail,—so that if and so long as the remainder itself endures it is ready to take effect in immediate possession, not an hour before or an hour after, the particular *estate* from any cause ceases to exist, and (b) simultaneously with and in effect by the instrument which creates the particular estate (Co. Litt. 143 (b); Fearne 11, 301; Challis, 2nd ed. 69; Butler Fearne, p. 3; *White* v. *Summers*, [1908] 2 Ch. p. 265; Fearne 398; *Blackman* v. *Fysh*, [1893] 2 Ch. 209; *Cogan* v. *Cogan*, Croke El. 360). After the Statutes had once validated powers of appointment, the exercise of a special power was read for this purpose as one with the instrument creating that power (par. 11).

A contingent legal remainder is a limitation for life, in tail, or fee giving in inception of the instrument no *estate* at all, but the merest chance that in the event it may vest as an estate (51 L. Q. R. p. 671 and note, pp. 677—680) during or *eo instante* with the expiration of the actual *estate* on which it is limited to depend, otherwise it was a complete nullity at law.

Actual falling into possession not necessary to vest a remainder.

(33) To constitute a vested remainder it is not the least necessary that it ever do fall into actual possession. Thus limitation to A for life, remainder to B for life, or in tail, but if B predeceases A then to C for life or in tail : B's remainder is vested in interest, C's remainder is contingent (Fearne 215, 216; *Couthurst* v. *Bejushin*, Plowd. 21; Fearne 262, 263; *Cardigan* v. *Curzon-Howe*, [1901] 2 Ch. 479; Gray, ss. 102—108) : and if the limitations be in tail, A and B can effectually bar C's contingent remainder in tail, though B afterwards predeceases A (*Cardigan* v. *Curzon-Howe*, *supra*; *Milbanke* v. *Vane*, [1893] 3 Ch. p. 89; Fearne 373, 374). But vary the limitation, as to A for life, *and if B shall survive A*, then to B, etc. as above : here we have an alternative contingent remainder in B or C as the event shall turn out (Fearne 373, 374; Gray, s. 108 (3)).

The Modern Perpetuity Rule never governed legal *contingent remainders.*

(34) A legal contingent remainder to be valid had to vest as an estate during or *eo instante* with the expiration of the particular *estate*, not chance of an estate, on which it was limited to depend : see authorities cited (par. 32) and in the writer's article, 51 L. Q. R. pp. 677—682, though statutes from time to time have met most cases of such failure. But the modern rule of perpetuity had, it is submitted, no application thereto. See that article,

pp. 668—682; and add to the authorities there cited at pp. 679 to 681 the further authority of Joshua Williams, R. P., 1887 ed. p. 311; Gray, s. 325; *Davy* v. *Clarke*, [1920] 1 Ir. 137—a true case of contingent legal remainder vesting in due time, *viz.* on the appointor's the life tenant's death, limited on a double contingency, *i.e.* attainment of age of 25, and selection by the appointor. Let us recollect that a single contingent remainder may embrace all the four contingencies defined by Fearne: see Fearne, p. 9, Butler's note. A *legal* contingent remainder in English land can no longer exist (*L. P. A.*, *s.* 1), but of course it can still exist in any part of Ireland, and the old law applies to one existing on December 31, 1925, in English real estate (*L. P. A.*, *s.* 39, 1*st Sch.*, *Part I*).

But besides this vesting rule applicable to a contingent *legal* remainder, there formerly existed a totally independent rule applicable alike to both legal and so called equitable remainders.

The Possibility Rule—Whitby *v.* Mitchell; Re Nash—*formerly applied to legal and equitable contingent remainders.*

(35) Till abolished as to England and Wales but not Ireland as to limitations and trusts created by an instrument coming into operation after December 31, 1925 (*L. P. A.*, *ss.* 161, 209 (which we suppose applies to exercise of a special power of appointment after that date in pursuance of an instrument earlier in date), there existed as regards both legal (Touchstone, p. 506, text first published A.D. 1648; *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85) and equitable (*Re Nash*, [1910] 1 Ch. p. 1; *Monypenny* v. *Dering*, 2 De G. M. & G. 145) settlements by way of particular estate and remainder of real estate, including Copyholds (*Re Clarke*, [1916] 1 Ch. p. 478), and money subject to an imperative trust to be laid out in purchase of land (*Whitby* v. *Mitchell*, *supra*), but not in regard of pure personal estate which could not be given legally in remainder (*Re Bowles*, [1902] 2 Ch. 650; *Re Clarke*, [1916] 1 Ch. 467; Fearne, pp. 401—406), a rule totally separate from, independent of, and additional to the modern perpetuity rule—where indeed the latter had any application see *Whitby* v. *Mitchell*; *Re Nash*, *supra*, and citations from Fearne; 51 L. Q. R. pp. 673—675; Butler Fearne 565, note—which rule for distinction we call "the Possibility Rule". This rule may be stated thus—that though you may lawfully give an estate for life to an unborn person, you cannot follow it with a remainder to that unborn person's child or issue without creating an intermediate particular estate, so as to enable the child or issue of that unborn person to take *as purchaser*—and that unless (as may be

possible in certain cases in case of a devise) you can apply the doctrine of *cy-près* so as to give that unborn person an estate tail, though his estate for life will be good, all subsequent remainders on that estate for life will be void (Fearne 502; *Re Mortimer*, [1905] 2 Ch. 502 : cp. par. 12).

This possibility rule did not apply in such a case as this; limitation to a spinster for life, remainder for life to any husband she might marry—remainder to their children (*Re Garnham*, [1916] 2 Ch. 413; *Re Bullock*, [1915] 1 Ch. 493). A child *in ventre* was living for the purpose of this rule (*Re Wilmer's Trusts*, [1903] 1 Ch. 874; 2 Ch. 411).

The abolition as regards England and Wales but not any part of Ireland of "the possibility rule", has it is thought opened the way to an enormous extension in effect of the time for which English real property can be kept limited in strict settlement. See Precedent of a Will by the present writer in The Conveyancer, September, 1936.

The Perpetuity Rule always applied to equitable contingent remainders.

(36) The rule that a legal contingent remainder must vest as an estate during or *eo instante* with the expiration of the particular estate, being a feudal rule to preserve the certainty of the legal seisin, never applied to equitable limitations in settlement, the legal estate in such case being full of the feoffees to the equitable use, nor consequently to limitations even expressed as legal, where the legal fee was vested or outstanding in trustees or mortgagees at the date of the instrument coming into effect (Fearne 303, 304; *Astley* v. *Micklethwait*, 15 Ch. D. 59; *Abbiss* v. *Burney*, 17 Ch. D. 211; *Re Freme*, [1891] 3 Ch. 167; *Re Brooke*, [1894] 1 Ch. 43; *Re Robson*, [1916] 1 Ch. p. 124).

To such equitable remainders the modern perpetuity rule always applied (*Abbiss* v. *Burney*, 17 Ch. D. 211; *Re Wilmer's Trusts*, [1903] 1 Ch. 374; 2 Ch. 411; *Blagrave* v. *Hancock*, 16 Sim. 371).

The rule in relation to executory Limitations subsequent to an estate tail.

(37) Originally as resolved A.D. 1454 a legal contingent remainder on a particular estate tail had to vest during the life of or *eo instante* with the death of the original *purchaser* in tail, otherwise it was a nullity (Fitz. Abr. Feffments 99; Brooke, Done and Remainder 37; 51 L. Q. R. pp. 681, 682) : but after the bar of an estate tail with consequent destruction of all subsequent remainders and executory limitations over had become of

everyday occurrence, it was established at least as early as in Queen Elizabeth's reign that the legal contingent remainder had the entire duration of the estate tail wherein validly to vest as an estate (Co. Litt. 319 (b); *Bedford* v. *Russell*, Popham, p. 3; 2 Rolle Abr. 418, I, pl. 4; Fearne 309; Gray, s. 447). This power of tenant in tail to bar all subsequent (see par. 13 at end) executory limitations over saves them from invalidity under the modern perpetuity rule, except in effect where the settlement leaves a possible gap between the natural expiration of the estate tail and the arising in force of the executory limitation (see Gray, chap. 14), or when the settlement of a then existing reversion makes the limitations thereunder to commence operative on too remote an event, *e.g.* A has already settled Blackacre on himself for life, remainder to his son B for life, remainder to B's first and other sons in tail *male*, reversion to A in fee: and A then devises the reversion in settlement so as to make the limitations commence only on the *failure of issue generally of the body of B.* See Fearne 447 *et seq.*; Gray, s. 452.

The Perpetuity Rule in relation to Charities.

(38) There can be a valid gift of income of personalty corresponding to a terminable fee in real estate whether to an individual (pars. 22, 23) or to a Charity (*Re Randell*, 38 Ch. D. 213; *Re Blunt*, [1904] 2 Ch. 767; *A.-G.* v. *Pyle*, 1 Atk. 435), terminable according to the very original limitation of the gift itself.

But a gift over on a remote event from an individual to a Charity (*Worthing* v. *Heather*, [1906] 2 Ch. 532; Gray, s. 594) or from a Charity to an individual (*Re Davies*, [1915] 1 Ch. 543; *Re Talbot*, [1933] Ch. 895; Gray, s. 593) is void.

There can however be a valid gift over from one Charity to another Charity for non-performance at any time by the first Charity of a condition not illegal in itself (*Re Tyler*, [1891] 3 Ch. 252).

The rule in relation to easements and profits a prendre.

(39) A presently vested right to an easement though its exercise is obviously not intended to be immediate is good (pars. 19, 20, 21), but must be distinguished from a right to arise *as a right* for the first time only on too remote an event which would be bad (Lewis 619, 620; *S. E. R.* v. *Associated, etc.*, [1910] 1 Ch. at pp. 25, 27; *Smith* v. *Colbourne*, [1914] 2 Ch. at pp. 541, 543). The right is not the less presently vested because the instrument shows on its face, as by giving the right to a man and his heirs or otherwise, that it may not, and probably will not, be put into

actual exercise for a very long time, if ever (*S. E. R.* v. *Associated, etc.*, [1910] 1 Ch. 12, judgment of Eady, J.: cp. the reservation of a perpetual *profit a prendre* of digging coals, *Sutherland* v. *Heathcote*, [1892] 1 Ch. 475). Thus a landowner granting a long strip to a railway for its line, can validly reserve to him and his heirs a right of tunnelling under the line for accommodation purposes when required, and as an incident to such presently vested right, the right to select the actual spot for the tunnel (*S. E. R.* v. *Associated*, *supra*). Were it otherwise a landowner foreseeing development of his estate in the distant future, would be obliged to retain unsold a parcel which he does not wish to keep, but over which an easement would be necessary and sufficient for the rest of his land. In so far as *Sharpe* v. *Durrant*, 55 Sol. Jo. 423 denies this, it seems to be wrong. Now as to easements of many kinds see *L. P. A.*, *s.* 162 (d).

Rents at their creation.

(40) Strange things could be done at common law with a previously non-existing incorporeal subject-matter such as a rent at its initial creation (Fearne 528; Preston, Estates, 218; Challis, 2nd ed. 102). But when a rent had once been created the general rules of law as to dealing with corporeal land applied thereto, *e.g.* the necessity of a legal contingent remainder therein to vest in due time (Perkins, s. 52; Fearne 529; Gilbert Rents 59, 60).

The construction of the Instrument is regardless of the rule.

(41) Finally the draftsman must recollect that the Court construes the words of the instrument (subject only to *L. P. A.*, *s.* 163, where that section has application : see pars. 2 and 3) as if the modern rule of Perpetuity did not exist (*Ward* v. *Van Der Loeff*, [1924] A. C. pp. 660, 663, 679; Gray, s. 630).

If then the words are free from ambiguity in point of construction, and on true construction might by any possibility involve an offence against the rule, however improbable it be that an actual fact of offence will arise, the rule applies : see the last cited case as an excellent instance.

But if there is an ambiguity, and on one possible construction there will be no offence against the rule, on another there would be, the Court will adopt the more merciful construction. Assuming that there was indeed any ambiguity in the words used in *Re Watson*, [1930] 2 Ch. 344, that case, decided in relation to the old possibility rule, and on the present writer referring the Judge to *Whitby* v. *Mitchell*, affords an illustration. See also Gray, sections 633, 633 (a); *Re Stamford and Warrington*, [1912] 1 Ch. 343.

There is too as to limitations created by devise before 1926 when the old possibility rule (see par. 35) was abolished as to future created limitations, the doctrine of giving the unborn child an estate tail *cy-près*, where that was possible, as to which see Gray, s. 643 *et seq.*, instead of the life estate given him by the will with remainder to his issue, and thus giving that issue a chance of taking by descent what the possibility rule prevented it from taking as purchaser. A doctrine, however, which it has repeatedly been said is not to be extended (*Re Mortimer*, [1905] 2 Ch. 502; *Re Mountgarret*, [1919] 2 Ch. 294, 304.

F. E. Farrer,

February, 1937.

REDUCTION OF ASSESSMENTS.

By J. Austin, LL.B., Solicitor.

A period of industrial depression, during which all overhead charges are subjected to close scrutiny, has the effect of bringing rates into the limelight. In these days particularly, with rents dropping and property falling empty, the attention of both ratepayers and rating authorities is being forcibly directed to the two opposing questions How can I get my rates reduced? on the one hand and Why should we reduce them? on the other. The purpose of this article is to examine—in outline only, for it is a large subject—the answers to these questions. So far as possible, we shall confine our attention to the ratepayer's point of view in action initiated by himself, excluding the large question of objections and appeals on action taken by the rating authority.

In rating law it is necessary to make an immediate distinction between London and the rest of the country, since the two systems respectively in force are different in many particulars and especially in the matter of procedure. Nevertheless, most of the basic principles of rating law remain common to both. London is governed by the Valuation (Metropolis) Act 1869; the Provinces are governed by the Rating and Valuation Act, 1925; but both these Acts have the same grandfather, so to speak, in the Parochial Assessments Act, 1836, and of course the same more distant ancestor in the Poor Relief Act, 1601, which represents Adam in the genealogy of rating law. We shall therefore deal first with the general rules common to both systems and then with particular rules wherein they differ.

General Principles.

It is necessary from the first to keep clear also the distinction between valuation and rating. Valuation is the method of ascertaining the values upon which rates are payable, whilst rating is the method of levying the rates upon those values when determined. This distinction, though apparent enough, is not so invariably remembered as to make its emphasis unnecessary, and it is an unfortunate client whose adviser is not sure whether he wishes (or is able) to have his rates remitted or to have his assessment reduced. The point is well illustrated by the case of *Gage* v. *Wren*

(1902), 67 J. P. 32, the subject of which was a seaside boarding house. The tenant found that it did not pay her to keep the house open during the winter months, so she removed all the furniture except a few fittings and fixtures and shut the house up. It was then claimed that during the winter months the house was not rateable, *i.e.*, that although there could properly be a rateable value in the valuation list in respect of it, no rates should be levied thereon. This claim was disallowed on the ground that there was beneficial occupation, taking the year as a whole, and the fact that the tenant found it profitable to open only during the summer was part of the nature of the hereditament. Darling, J., aptly compared the hereditament with a fruit tree which bears fruit only during the summer; but an orchard could not be exempted from rating during the winter. On the other hand, the fact of the tenancy being only profitable during the summer would, as we shall see later, be clearly a matter affecting the intrinsic value of the premises and present in the minds of landlord and tenant when fixing the rent. The limitation in the user of the premises was therefore a matter to be taken into account not in the rating but in the valuing of the house.

The primary matter, and the one with which we are now concerned, is therefore valuation—that has to be settled before there is any question of rating—and the key to valuation law is the definition of Gross Value. It is worth quoting in full : it is "the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rent-charge and if the landlord undertook to bear the cost of repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent" (Rating and Valuation Act, 1925, s. 68). A great deal of case law has collected round this definition since it first appeared, slightly differently worded but essentially the same, in the Parochial Assessments Act, 1836. But, unlike many definitions similarly encrusted with case law, the definition of Gross Value has not been eaten away. It must be considered afresh in every valuation problem and the "tenant" therein referred to —that elusive personality usually known as "the hypothetical tenant"—is the spectre who stands at every valuation lawyer's elbow.

The most usual problem to arise involves the relationship between this hypothetical tenant with his (hypothetical) rent and the actual tenant and his (actual) rent. The relationship is often assumed to be mathematical; that is to say, in order to arrive at gross value, take the actual rent, deduct an appropriate percentage

for services, repairs and so on, and adjust according to whether or not it is inclusive of rates. In theory this is normally accurate, since the actual rent, negotiated upon the open market, should be a fair guide to the actual rental value; but in practice there are other considerations, such as the date and length of lease and the relationship between landlord and tenant, which must also be taken into account. The effect of those considerations is a matter within the province of the Valuer; so far as the law is concerned, we have this simple point, that they *must* be taken into account and actual rent is good evidence, but not conclusive evidence, of the gross value; see *R.* v. *School Board for London* (1886), 17 Q. B. D. 738. It follows therefore that a reduction of rent, or the landlord's inability on reletting to obtain the previous rent, is not *per se* a legal ground for reducing the assessment.

On the same principle, a reduction of profits earned in business premises is not *per se* a legal ground for reducing the assessment. It may indeed be evidence that the intrinsic value of the premises has decreased, but it may also be evidence that, say, a new manager has been appointed or of many other things. Ryde on Rating (p. 211) sums up the rule thus: "As a matter of law, profits must be regarded as affecting rateable value just so far as those profits would, as a matter of fact, affect the rent which may reasonably be expected." This proposition is straightforward so far as ordinary business premises, with an actual landlord and tenant, are concerned, but as regards certain rateable hereditaments such as electricity undertakings, docks and tramways, where one body may combine in itself the persons of landlord and tenant and almost everything is hypothetical, including profits, the proposition is anything but straightforward; nevertheless, it is the true guiding principle; see, *e.g.*, *Kingston Union* v. *Metropolitan Water Board*, [1926] A. C. 331. But this is leading beyond our subject.

From the foregoing it will be seen that the law of valuation consists of rules for the application of facts to an abstract inquiry. Rent and profits are two of such facts: two others are the user and condition of the hereditament. But to say that the latter are, like the former, no more than evidence of the rental value is misleading, because rules have been formulated from time to time which make the consideration of these two facts a different matter. As an illustration, we may take the case of a bank, occupying the same area and of the same general design as an adjoining shop, but, let us say, the rent is higher, the profits are lower, the user is different and the condition, due to the special bank fittings, is better. How must these four elements of fact be

taken into account in the rateable value? Commercially, the rent is the product of the other three items, since that is the rent which the banker is willing to give for those bank premises in that condition and situation and producing those profits. In one sense the bank may even be making a loss, but the banker may consider it worth his while to keep the premises from the points of view of advertisement, prestige, competition and so on. He might be willing, if necessary, to pay more, but the rent in any event represents the minimum value of the premises to him. The tenant of the adjoining shop, however, would not give so much for the bank premises: their value to him is indicated by the lower rent which he pays for similar premises next door. Now, we are out to find their value to the hypothetical tenant and we come therefore to the important question—a question of law—Is the hypothetical tenant a banker or a shopkeeper? If a banker, is he our particular banker? If neither, then what is he? The consideration of rent and profits is a question of fact because as a matter of law they are merely evidence. Considerations of user, condition and situation, however, involve questions of law and must be examined because, until we have decided in what way these matters may affect rateable value, we clearly cannot decide how a change in them may be a ground for reduction.

The principle governing user as a factor in valuation was stated in the case of *Metropolitan Water Board* v. *Chertsey Union* (1916), 85 L. J. K. B. 308, in effect thus: Rateable value must take into account the fitness of a hereditament for the purpose for which it is in fact used, but the fact that any particular use is made of it is only material so long as such use is inherent in the nature of the hereditament and not in the nature of the occupation. In that case the Water Board had a statutory privilege to draw water from the river and because of that privilege and the use they made of it certain property of theirs by the riverside was particularly valuable to them. It was held that the extra value of the property to the Board by reason of their privileged user was not material to the assessment. In other words, the hypothetical tenant must not be regarded as having that privilege. Returning to our bank, therefore, we can equally well say that the hypothetical tenant must not be assumed to be our particular banker, since the particular value of the bank to him is due to circumstances peculiar to himself—a value in gross and not appurtenant, as Lord Parker called it—on the principle that applied in the Water Board's case. Is the hypothetical tenant then a banker at all? Lord Parker says: "It is true that in the *Hertford Case*, [1902] 2 K. B. 597, Lord Collins mentions the 'user' of the hereditament in

question as an element of value, but it appears that he employed the expression as meaning 'fitness for the purpose for which the hereditament was actually used'. In this sense 'user' can legitimately be taken into account as an element of value." The bank is used for banking and is adapted and fit for that purpose and the two facts in conjunction may accordingly be taken into account. In other words, the hypothetical tenant may be a banker. We ask next, Must he be a banker? Suppose that the premises, built and fitted for banking, were in fact occupied by a milliner, who paid a low rent by reason of the difficulty of adapting the premises to his trade, would the rateable value properly be lower? On the strict application of Lord Parker's judgment it might appear so, but note the words "an element"—not "the only element". Another element which must be taken into account is the fitness of the premises for any purpose for which they *can* be used. We must therefore inquire why the bank is occupied by a milliner and, if the reason is merely the caprice of the landlord and tenant, then the low rent is attributable to a personal quality in the same way that the Water Board's high rent was due to a personal quality, and must not be taken into account. But if the reason is that no bankers want the premises and that the milliner is the best tenant that can be obtained, then the low rent is due to something inherent in the property itself and must be taken into account. In short, the hypothetical tenant is the tenant who, all things being equal, will pay the best rent, whether he is a banker, a milliner or anyone else.

A further point that emerges from these considerations is that the user of the hereditament cannot be separated from its condition, for user cannot be taken into account unless it is the product of condition. It is with the hereditament itself that we are concerned, first and last. To this proposition there appears to be an exception in the derating of industrial hereditaments, where the reduction of rates depends solely on user. But there is no real exception, since the reduction is not in the assessment—gross value remains the same—but in the amount of rates levied, a distinction already emphasised. A real exception exists in the case of certain Scientific Societies and other bodies exempted from the payment of rates where, instead of no rates being levied on a full assessment, the gross value is reduced to nil.

Although potential user rather than actual user is to be regarded, in the case of condition it is actual condition alone which matters. Vacant land may be capable of letting well for building purposes; a dilapidated house might command a high rent if put into good repair; an ironmonger's shop might be more

valuable if converted into a jewellers; but in none of these cases can the possible improvement be taken into account in calculating the assessment. This principle has been established by a number of cases of which the following three are representative: *R.* v. *Grand Junction Ry.* (1844), 4 Q. B. D. 18; *Metropolitan Board of Works* v. *West Ham* (1870), L. R. 6 Q. B. 193; and *Port of London Authority* v. *Orsett Union*, [1920] A. C. 273. The important practical application of the principle can be illustrated thus: If the owner of a house chooses to store furniture in his house instead of letting or occupying it, he is entitled to no reduction of assessment on that account. But if he converts it into a warehouse by structural alteration, then, assuming a warehouse to be less valuable than a house, he is so entitled.

Mention has been made of the condition of a house, but it must be realised that the term includes more than the state of repair, the kind of building or its situation. It may include also the local state of the particular trade concerned, continuing strikes in a particular industry, a statutory restriction on making full use of the hereditament, a revenue duty such as the liquor licence duty, or the fact that the traffic in the street is one-way only. In short, to quote Denman, C.J., in *R.* v. *Grand Junction Canal Co.* (1844), 4 Q. B., at p. 36, one must take into account "all the existing circumstances whether permanent or temporary, wherever situated or however arising or secured, which would reasonably influence the parties to a negotiation for a tenancy as to the amount of rent to be asked or given" subject, of course, to the limitation expressed above in the Water Board's case. All such circumstances as he describes that are existing at the time when the actual rent is fixed are, in theory and by definition, taken into account in the amount of such rent, but the rating authority are not, as we have seen, bound by the actual rent. They may treat it as representing more or less than the actual value of the hereditament; but there is naturally a presumption that the rent is a fair guide and in practice the onus of proving that any such circumstance is not represented in the actual rent lies on the party alleging it. With regard, however, to changes of circumstances occurring after the rent has been fixed, no such presumption arises and, notwithstanding that the rent remains unaltered, the rateable value must be reduced if the change is one which would have affected the rateable value in the first place.

It has been emphasised above that actual and not potential circumstances must be regarded in calculating the rateable value. It may be added, nor future circumstances; but care must be taken here to distinguish between future circumstances which inevitably

affect the rental value now and those which may or may not take place and will not affect the value unless they do. For example, the fact that a house is in such a condition that it must be demolished in a few years is clearly a factor affecting its present value. But the fact that an owner has it in mind to demolish a good house and clear the site for a garden cannot be taken into account until he does so. Less obvious applications of this rule are to be found in the case of premises in a developing or declining area where values as a whole are rising or falling, a discussion of which point is, however, better postponed for treatment separately as to London and as to the Provinces.

Another application of the principle is in the case, already mentioned, of the complete or partial exemption from rates granted to Scientific Societies and to industrial hereditaments respectively. With the grounds of exemption we are not now concerned, but an important practical point is that in such cases the rating authority cannot proceed upon prospective applications but must wait until the occupation on which exemption is claimed has commenced.

Before passing from the general principles governing the reduction of assessments, mention must be made of the subject of uniformity. Five years ago this would have been more difficult to deal with than now, but the case of *Ladies Hosiery, etc., Co.* v. *Assessment Committee for West Middlesex*, [1932] 2 K. B. 679, has considerably simplified the position. It had always been thought that it was permissible to support a reduction of one assessment on the ground that another assessment in the same rating area was unjustifiably on a lower basis. This chiefly rested on the authority of *Double* v. *Southampton Assessment Committee*, [1922] 2 K. B. 213, where the rating authority decided to revalue every hereditament of a certain class in their area : the revaluation was delayed when only half completed but the authority, without waiting for its completion, meanwhile raised the assessments of those which had been revalued, though not higher than their value warranted. The occupier of one of these sought to have the increase disallowed on the ground that it was unfair in comparison with those which had not been raised, though admittedly fair in itself, and he succeeded. In the *Ladies Hosiery Case*, an appeal was brought against the assessment of one shop on the ground that seven other similar shops were assessed at a lower value, though it was admitted that the higher value was justified. Whilst granting that the appellant might have grounds for having the assessments of the other shops raised to that of his own, the Court of Appeal emphatically disposed of the view that he had any grounds for having his own lowered to theirs. "The one

concrete fact which emerges (said Eve, J.), is the correctness of the assessment of the appellant's premises, and when that is once recognised as established there is really nothing more to be said." *Double's Case* was distinguished on the ground that it was decided simply on the question of the time when a general change should be made, if made at all. This case has very much diminished the value of quoting comparisons in support of a reduction of assessment, since other assessments are not relevant unless they are first proved to be correct.

London.

As has been mentioned, London rating and valuation law is practically codified in the Valuation (Metropolis) Act, 1869. The central feature of the code is the "quinquennial principle" whereby, in theory at least, every rateable hereditament is revalued *de novo* once, and no more, in every period of five years, whilst during the intervals assessments may only be altered to give effect to some change of circumstances affecting in particular some hereditament or class of hereditaments. Such is the interpretation put by the Courts upon section 47 of the Act, which reads: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions (*i.e.*, as to re-assessment) shall have effect . . ." As it stands, an increase or reduction from any cause is enough, but the word "cause" has been construed more or less *ejusdem generis* with the preceding words to mean some particular physical happening, so that the level of value fixed in a quinquennial valuation list must be deemed to be fair for the ensuing five years, even though it may in fact have increased or decreased, if such alteration is due to general causes operating on all rateable hereditaments (see *Ellis* v. *Camberwell Assessment Committee*, [1900] A. C. 510). To illustrate this point; the demolition of a wing of a house can be a proper cause for reducing, during the quinquennium, the assessment of that house, and the closing of a bridge can be a proper cause for reducing the assessments of a dozen shops: but a period of prosperity which tends to raise values generally is not a ground for increasing any particular property, nor is a general depression a ground for reducing the assessments of, say, jewellers' shops which, trading in luxuries, might be particularly affected. We may contrast the case of *Ellis* v. *Camberwell* (*supra*), where an increase in the value of public-houses in London was held to be no ground for increase since it

arose from an increased prosperity throughout the community, with the case of *R.* v. *Shoreditch Assessment Committee*, [1910] 2 K. B. 859, where an increase in the value of public-houses was held to be a proper ground because it was due to an increased licence duty affecting all public-houses, but no other class of property.

Except at the quinquennial revaluation, therefore, it is of no avail in London to show that the value of a property is in fact lower than appears from the current valuation list, unless one can also point to some material, substantial and particular happening to account for it. If values generally are rising or falling, effect cannot be given thereto until the next quinquennial valuation.

This principle also gives rise to a rule comparable with the commercial saying that "mistakes cannot be rectified after leaving the counter". Once the quinquennial list has been finally approved, the rating authority have no power to alter it except for some cause such as we have described. Even if there has been an error of valuation, the assessment is, by section 45, deemed to be correct and strictly speaking must stand for five years. So also, if the occupier inadvertently omits or is unable to give notice of objection to the list at the proper time, his chance is lost for five years.

The opening words of section 47, quoted above, are "If in the course of any year . . ." and, although apparently innocent enough, those words contain a trap for the unwary. For the Courts (see *R.* v. *St. Mary, Bermondsey* (1884), 14 Q. B. D. 351, presumably on the grounds that the words would have no meaning unless they were given one, have construed them as meaning that the alteration of assessment must take place either in the same year as the cause on which it is founded or not at all; and in London rating, "year" always means from one April 6 to the next.

Assuming, however, that a proper cause has arisen, the procedure to be followed is found in the remainder of section 47; but, before dealing with that, it will perhaps be useful to give an outline of the scheme of valuation lists in London. The quinquennial list has already been mentioned: it is made in the spring or summer of 1930, 1935, and so on, approved the same autumn or winter and brought into force on the following April 6. There is a right of objection to the assessment committee and a right of appeal from their decision either to Special Sessions (but rarely exercised now) or to Quarter Sessions. In the summer of each of the four intermediate years a supplemental list is made, with the object of bringing the quinquennial list up to date by incorporating therein all the changes which have taken place during the year

preceding each supplemental list. There is a right of objection and of appeal and the list comes into force on the following April 6. During the year, alterations are given temporary effect by means of provisional lists, which are made periodically and more or less frequently; there is a right of objection, but not of appeal; yet there is a right of appeal ultimately, since the supplemental list is in effect a collection of all the provisional lists made during the year, so that a further opportunity of objection and appeal is afforded, and any reduction made dates back to the date of the provisional list in which the alteration first appeared. The following illustration will perhaps make clearer this necessarily condensed survey. The quinquennial list of 1935 comes into force in April, 1936. In May, 1936, a certain house has, say, a wing added and the vigilant rating authority at once insert it in a provisional list with an increase of £20. The occupier objects on the ground that this is excessive but his objection is disallowed (note that neither he nor the rating authority can re-open the question of the whole assessment; only the increase due to the new wing can be in question). He must pay rates on the increased value as from the date of the provisional list in May, 1936. In June, 1937, the supplemental list is made in which the hereditament appears again, as a matter of course, with the same increase of £20. Once more the occupier objects and once more is overruled, but on appeal to Sessions the increase of £20 is reduced to £10. This reduction dates back to May, 1936 (section 47 (10)), and any rates overpaid must be refunded.

So much for increases, which can be safely left to the rating authority to deal with. But to secure the benefit of any cause which reduces the value is naturally the concern of the ratepayer and we find his safeguard, returning to section 47, in sub-sections 1 and 2, which provide that, where there is due cause, the rating authority may, and on the written requisition of any ratepayer *shall*, include the hereditament in a provisional list; a copy of such requisition shall be sent also to the clerk to the assessment committee who, if the rating authority fail within fourteen days to comply therewith, shall do so in their stead. It has been held (in *London County Council* v. *Islington Assessment Committee*, [1915] A. C. 762) that this section imposes a purely ministerial duty upon the rating authority on receiving a requisition, so that they can only refuse to comply with it on the grounds that it is made frivolously or not *bona fide*. Not even a *prima facie* case for a reduction need be made out. On the other hand it is open to the rating authority, if they are of opinion that there is no ground for a reduction, to insert the hereditament in a provisional

list but at the existing values; in such a case the occupier may object to the list and argue his case before the assessment committee, who will either allow his objection or, if they disallow it, will strike the entry completely out of the list. Being but a provisional list, there is no appeal to Sessions and if the ratepayer wishes to persist he must wait until the next supplemental list is made and object to it upon the ground that his property is omitted therefrom. Here, of course, he has a right of appeal but, unfortunately for him, if he succeeds at Sessions his reduction will not date back—there is no provisional list entry for it to date back to—and in fact it will not come into force until the following April 6; nor have the rating authority any power to date it back.

This illogical note is an appropriate one upon which to conclude our outline of the London law. Even in this short summary, several anomalies are apparent, whilst the number which emerge in daily detailed administration sorely harass the conscientious rating officer. There are rumours now of a new Act—but then, there have been rumours of a new Act for at least ten years.

Outside London.

Procedure throughout the rest of the country is governed by the more modern Rating and Valuation Act, 1925, which, profiting by London's experience, has avoided most of its anomalies. Supplemental and provisional lists have disappeared and there is but one valuation list, which is kept up to date by frequent, but not necessarily periodical, amendments (known as "proposals" and made at the instance of either rating authority or ratepayer). As in London, the whole valuation list is remade once in every five years (see section 19 (1)). This may one day be held to have introduced a quinquennial principle, *i.e.*, that the general level of values should be taken as fixed at the quinquennial valuation to last for the ensuing five years, but on the face of the Act there is nothing to that effect. The current valuation list can be amended at any time on the ground of "incorrectness or unfairness" (section 37). There is no mention of a "cause" or a "year", words which, as we have seen, appear with such dire results in the London Act. It is apparently open to the rating authority, if they consider that a rise in prosperity justifies it, to increase the value of every hereditament in the list at any time during the quinquennial period. Moreover, the usual provision that the valuation list shall be deemed conclusive (section 28 (3)) is qualified by the words "unless the contrary is proved", so that no one who omits

to object in time is prejudiced, nor can errors seek five years' sanctuary in the approved list.

The ratepayer therefore is not limited in the grounds on which he can seek a reduction of his assessment except to the extent indicated in the first part of this article. The procedure (section 37) is to make a written "proposal" to the rating authority, which must specify the grounds on which a reduction is claimed and should, according to the better opinion, specify the correction which is desired, either in exact or in general terms. No other person need be served with notice. Prompt compliance with the proposal is not so important to the ratepayer as in the case of a London requisition, since any alteration which is made dates from the beginning of the rate period current at the date of the proposal or, if it is founded on some physical event, a fire, for example, from the date of such event. Nevertheless, section 37 prescribes certain time limits with which the rating authority must comply.

From this summary it will be seen that the applicant outside London has fewer procedural difficulties, when seeking a reduction of assessment, than his London equivalent. To obtain such reduction, however, is alas no whit easier an undertaking.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 135.)

Law Society's General Condition.

Abstract.

8.—(1) The Vendor shall deliver to the purchaser or his solicitor—

(a) an abstract of the title to the property sold, or

(b) in the case of land registered with an absolute or good leasehold title, the particulars and information to be furnished in lieu of an abstract, with a written authority to inspect the register,

and, in either case, within ten days from the date of the contract.

(2) Where land is registered with a possessory or qualified title, the abstract, if any, shall only relate to estates, rights and interests, subsisting or capable of taking effect prior to the date of first registration, or excluded from the effect of first registration, and subject as aforesaid, the foregoing provisions, relating to absolute or good leasehold titles, shall apply.

(3) This condition so far as it relates to registered land shall have effect subject and without prejudice to the provisions of section 110 of the Land Registration Act, 1925.

When considering the effect of this condition the cases cited under Condition No. 7 should be remembered, so far as concerns the effect of failure to deliver an abstract of title within the specified time, both in relation to any claim for interest and to the possible extension by the Court of the time for completion, and the period of ten days mentioned in the Law Society's Condition should be adjusted if necessary to suit the particular circumstances.

It will be noted that the vendor is not placed under an obligation by the condition above set out to deduce "a good title according

to the special conditions" within the time limited, but only to deliver an abstract of title, and the delivery of an imperfect or incomplete abstract will not of itself entitle the purchaser to rescind: *Sherwin* v. *Shakspear* (1854), 5 D. M. & G. 517, at p. 528; 23 L. J. Ch. 177, 898.

Sometimes it is stipulated that the vendor is to deliver a "complete" or a "perfect" abstract. It is quite clearly established that the vendor's obligations will then be fulfilled if within the time specified he delivers the best abstract which he can deliver from the material in his possession: *Oakden* v. *Pike* (1865), 34 L. J. Ch. 620.

In *Pryce Jones* v. *Williams*, [1902] 2 Ch. 517, Joyce, J., said that it appeared that the vendor had furnished the most perfect abstract which he could furnish at the time of its delivery; and that being so the abstract was not imperfect or insufficient because it showed a defective title, or even no title at all. See also *Want* v. *Stallibrass* (1873), L. R. 8 Exch. 175.

As to the provisions of Condition No. 8 of the Law Society's Conditions the following points require explanation:—

Condition 8 (1) (b).

"Particulars and information to be furnished in lieu of an abstract." Reference should be made upon this point to section 110 of the Land Registry Act, 1925, the effect of which is as follows:—

(a) In all cases the vendor must supply the purchaser with an authority to inspect the register.

(b) Unless the purchase money exceeds £1,000 the purchaser must, in the absence of any stipulation to the contrary, pay for any particulars of the land certificate or other information (within the limits next mentioned) which he requires.

(c) Pursuant to the policy of the Land Registry to "curtain off" all trusts no purchaser is entitled to a copy or abstract of any settlement filed at the Land Registry.

(d) Notwithstanding any stipulation to the contrary (but subject to payment as above mentioned where the purchase money does not exceed £1,000) the vendor must supply the purchaser (if required) with a copy of the subsisting entries in the register and of any filed plans and copies or abstracts of any documents or any part thereof noted on the register so far as they respectively affect the land sold (except charges or incumbrances

registered or protected on the register which are to be discharged or overridden at or prior to completion).

(e) Subject to any stipulation to the contrary the vendor must at his own expense furnish the purchaser with such copies, abstracts and evidence (if any) in respect of any subsisting rights and interests appurtenant to the registered land as to which the register is not conclusive, and of any matters excepted from the effect of registration as the purchaser would have been entitled to if the land had not been registered.

(f) Except as above mentioned and notwithstanding any stipulation to the contrary it is unnecessary for the vendor to furnish the purchaser with any abstract or other written evidence of title, or any copy or abstract of the land certificate or of any charge certificate.

Two points call for special note in relation to paragraph (f):—

(i) Where the property sold is part only of the land comprised in the title a complete copy of the land certificate cannot be required, but only a copy of such of the subsisting entries as affect the land sold.

(ii) The provisions of section 110 reproduced in paragraph (f) above cannot be varied by contract. There may conceivably be circumstances in which the purchaser requires certain information beyond that compellable under section 110: for example, a complete copy of a deed imposing restrictive covenants and of the plan thereon. In such a case it would be essential to stipulate for *and obtain* such copy before exchange of contracts.

(g) Where the register refers to a filed abstract or copy of or extract from a deed or other document such abstract or extract shall as between the vendor and the purchaser be assumed to be correct, and to contain all material portions of the original, and no person dealing with any registered land or charge shall have a right to require production of the original, or be affected in any way by any provisions of the said document other than those appearing in such abstract, copy, or extract, and any person suffering loss by reason of any error or omission in such abstract, copy, or extract is entitled to be indemnified (out of the indemnity fund) under the Land Registration Act, 1925.

Condition 8 (2).

The "estates, rights and interests" here referred to are as follows:—

Freehold Land (Land Registration Act, ss. 5 and 6).

(a) Absolute Title.

The registered freehold interest is subject to the following rights and interests:—

(i) Incumbrances and other entries on the register.

(ii) Overriding interests as defined by section 70 of the L. R. A., 1925 (see below p. 235).

(iii) Where the registered proprietor is not entitled for his own benefit to the registered land, then (as between himself and the persons entitled thereto) to minor interests, *i.e.*, all interests arising by virtue of dealings with the registered land off the register, of which the registered proprietor has notice.

(See Land Registration Act, 1925, s. 5.)

(b) Possessory Title.

The registered freehold interest is subject to the following:—

(i) The rights and interests to which freehold land registered with absolute title is subject.

(ii) Estates, rights and interests adverse to or in derogation of the title of the first proprietor, and subsisting or capable of arising at the time of registration of the first registered proprietor: L. R. A., s. 6. In other words the registration in such a case is no guarantee of title whatsoever. For this reason it is essential where land is registered with a possessory title that the title to be shown by the vendor should normally commence with a good root of title, prior to the first registration, as if the title were unregistered. The Law Society's Condition does not in any way curtail the right of the purchaser to require the deduction of such title prior to registration. As to dealings subsequent to registration the register is conclusive, as section 6 of the L. R. Act provides that subject to the matters above mentioned registration with a possessory title has the same effect as registration with an absolute title.

It should be mentioned that under section 77 (3) (b) of the L. R. Act, where the land has been registered for fifteen years with a possessory title the Registrar is required if satisfied that the registered proprietor is in possession, and after making such inquiries and giving such notices as he thinks fit (including notice to owners of adjoining property), pursuant to Rule 48 of the L. R. Rules, 1925, to enter the title as "absolute". There is one exception to this provision, namely, that if the first registration was before January 1, 1909, the Registrar may postpone the conversion until he is satisfied as to title. It will be seen that although a purchaser is strictly entitled, in the absence of any express provision to the contrary, to investigate the title prior to the registration in the case of a possessory title registered for fifteen years, it is not in practice necessary to do so, except where the registration took place before January 1, 1909. The Registrar does not, except in the case last mentioned, require the production of the documents of title (see Rule 48 of L. R. Rules, 1925); but only of the transfer and the land certificate with a request for conversion of the title in the prescribed form, when the title must be converted from a possessory into an absolute title.

Leasehold Land (Land Registration Act, ss. 10 and 11).

(a) Good Leasehold Title.

The registration does not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease; but in other respects the registration has the same effect as registration with absolute title: L. R. Act, s. 10. In other words, the title can only be impugned on account of the defect in the lessor's title to grant the lease.

(b) Possessory Title.

The registration does not affect or prejudice the enforcement of any estate, right or interest (whether in respect of the lessor's title or otherwise) adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of the first proprietor; but in other respects

the registration has the same effect as registration with an absolute title.

Under section 77 (3) (b) of the L. R. Act, where the land has been registered for ten years with a possessory title the Registrar is required if satisfied that the registered proprietor is in possession, and after making such inquiries and giving such notices as he thinks fit, to enter the title as "good leasehold". As in the case of freehold land, where the title was first registered before January 1, 1909, the Registrar may postpone the conversion until satisfied with the title.

Rule 48, above mentioned, as to conversion of title without production of the earlier title deeds, applies to leasehold as well as freehold.

Overriding interests.

We have referred above to "overriding" interests. These interests in relation to registered land are of such importance that it seems desirable to make some reference to them. It would be out of place to set out here the whole of the provisions of section 70 of the Land Registration Act, 1925, which enumerates these interests, but the following are those which most frequently occur in practice:—

(i) Easements (not being equitable easements required to be protected on the register). Thus, rights of way created by deed may exist over the registered land, but may not be referred to on the register. A purchaser will nevertheless take the property subject thereto in the absence of any provision to the contrary in the contract.

(ii) Liabilities arising by reason of tenure in respect of quit-rents, crown rents and other similar liabilities.

(iii) Land tax, tithe rentcharge (now extinguished by the Tithe Act, 1936), and "charges or annuities payable for the redemption of tithe rentcharges". The tithe redemption annuities payable under the Tithe Act, 1936, would therefore appear to be overriding interests.

(iv) Subject to the other provisions of the L. R. Act, 1925, rights acquired or in course of acquisition under the Real Property Limitation Acts, 1833, 1837, and 1874, and any Acts amending those Acts (section 70 (1) (f), as read with section 3 (xii) of the L. R. Act, 1925).

It seems desirable to mention in this connection the very curious case of *Chowood, Ltd.* v. *Lyall*, [1930] 2 Ch. 156, a decision which has much shaken the faith

of practitioners in the value of an absolute title. It was previously assumed very widely that the provisions protecting the rights of persons in actual possession, and of persons in course of acquiring title by prescription, need give little if any alarm. It was no doubt felt that these provisions would be interpreted as applying only to cases in which suitable inquiries or inspection of the property would reveal the position. In *Chowood, Ltd.* v. *Lyall* (*supra*), A purchased and became registered as proprietor of certain land, which included two strips of woodland. B was the owner of the adjoining land, and the question which arose was whether these two strips of land ought to be removed from the registered title. It was shown that under an agreement as to boundaries some years previously the strips of woodland were to be regarded as being included in B's land. There appeared to be a custom of cutting the timber once each seven years; but in fact nothing had been done there for about fourteen years except that there was occasional shooting over these strips; but this was not confined to shooting from B's land. Altogether the evidence of *recent* physical occupation or possession was extremely slender. It was held that the strips of land in question could properly be excluded from the registration, by way of rectification of entry under section 82 (1) of the Land Registration Act, 1925. The title had been registered under the Land Transfer Acts, 1875 and 1897, but the same result must have ensued if the title had been registered under the Land Registration Act, 1925.

Misfortunes, they say, seldom come singly, and the whilom registered proprietor was in due course to appreciate the truth of this adage. Section 83 of the Land Registration Act, 1925, appeared to him or his advisers likely to afford balm to his injured feelings and replenishment of his pocket. That section provides that "Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified." It must have come as a considerable surprise to A to learn, as he did (see *Re Chowood's Registered Land*, [1933] 1 Ch. 574), that he had suffered no loss. The estate acquired by him upon registration was by virtue of section 69 (1) of the L. R. Act, 1925, subject to all overriding interests (including rights

acquired or in course of being acquired under the Statutes of Limitation, s. 70 (1) (f)). It was said that the rectification simply recognised the existing position and put the registered proprietor in no worse position. The result was that A was left to such remedy, if any, as he might have against his vendor.

The cases of *Chowood, Ltd.* v. *Lyall* and *Re Chowood* which we have just considered appear to make it quite clear that whether the person whose title is rectified is the *first* registered proprietor or is a transferee for value of the registered estate, the Registrar may remove from registration not merely a part but if necessary the whole of the registered land even though it is registered with an absolute title, and this without any compensation whatsoever to the registered proprietor, whose vendor may be untraceable or bankrupt. In order, presumably, to avoid the recurrence of this particular type of case, the Registrar now requires, where the plan is not certified by a surveyor, and consists of an unfenced piece of ground not clearly defined by physical features, that the boundaries be fenced in or defined by substantial posts before registration, and in many cases requires a Land Registry surveyor to make a personal survey.

These cases also emphasise the necessity, even in the case of registered land, in all cases where there is any possibility of doubt as to the exact extent of the land, of insisting upon a reliable plan (whether acting for vendor or purchaser), and (if acting for a purchaser) of insisting that any condition as to errors in the particulars or plan of the property should be limited to "trivial" errors, and that such condition (as in the case of the Law Society's Condition 31) should be so framed as to prevent the vendor from forcing the purchaser to accept property which differs substantially in quantity, quality or otherwise from the property agreed to be purchased.

(v) "The rights of every person in actual occupation of land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed".

It would seem, if the literal interpretation of this provision is to be accepted, that although in general the occupation of land by a tenant affects a purchaser with constructive notice of the tenant's rights (*Hunt*

v. *Luck*, [1902] 1 Ch. 428; *Holmes* v. *Powell* (1856), 8 De G. M. & G. 572), where a purchaser of registered land makes proper inquiries *of the occupier only*, but such occupier refuses or neglects to reply to inquiries, the purchaser takes free from any claim in respect of such occupation. It is, however, felt that this proposition cannot be accepted. It may well be that certain rights arising from occupation may be lost where the person in occupation refuses to answer inquiries. Possibly this might be the case so far as concerns a licence (not amounting to a tenancy or a legal easement) in respect of the limited user of land. The exception now under consideration cannot, however, apply to tenancies or legal easements, for they form a separate class of overriding interests. (See sub-clause (i) and the next following sub-clause.)

(vi) Again, "leases for any term or interest not exceeding twenty-one years granted at a rent without taking a fine" are also expressly included in section 70 of the L. R. Act, 1925, as overriding interests: section 70 (1) (k). By section 3 (x) "lease" includes an underlease and any tenancy or agreement for a lease, underlease or tenancy.

(vii) In the case of possessory or good leasehold titles, all estates, rights, interests and powers excepted from the effect of registration.

(viii) Local land charges, but not other land charges.

(ix) Rights of fishing and sporting, seignorial and manorial rights (until extinguished) and franchises.

(x) Mining rights subject to the limitations set out in section 70 (1) (l).

The Law Society's Condition No. 8 does not require the purchaser to take the property subject to overriding interests. The position in this respect is on exactly the same footing as if the land were unregistered. Certain common form conditions, however, have a bearing upon this point and will be dealt with later : see, *e.g.*, Law Society's Conditions Nos. 18 and 19.

Condition 8 (3).

The relevant provisions of section 110 have been set out above, and it is therefore unnecessary to comment further upon this sub-clause.

Law Society's Condition.

9.—(1) A purchaser shall within fourteen days after the day of the delivery of the abstract or the said particulars and information, whether or not the abstract or particulars and information are delivered within the time prescribed, send to the solicitors of the vendor, a statement in writing of all the objections and requisitions, if any, to or on—

(a) the title or evidence of title,

(b) the abstract or the said particulars and information,

(c) the contract, as respects matters not thereby specifically provided for,

and subject thereto, the title shall be deemed to be accepted.

(2) All objections and requisitions, not included in any statement sent within the time aforesaid shall be deemed to have been waived.

(3) The abstract, or the said particulars and information, though in fact imperfect, shall be deemed perfect, except for the purpose of any objections or requisitions which could not have been taken or made on the information therein contained.

(4) An answer to any objection or requisition, shall be replied to, in writing, within seven days after the day of the delivery thereof, and if not so replied to shall be considered satisfactory.

(5) Time shall be deemed, in all respects, of the essence of this condition.

The above condition is identical with Condition No. 6 of the Statutory Conditions of Sale, 1925, except as follows:—

(i) The Statutory Condition states that objections and requisitions not made within the time prescribed and "not going to the root of the title" shall be deemed to be waived, but the Law Society's Condition omits these words.

(ii) The above provision making time of the essence of the contract is omitted from the Statutory Condition.

As to time for delivery of abstract.

It is clearly established that time is not of the essence of the contract in this respect, in the absence of express stipulation to that effect, or special circumstances from which it is to be deduced that the parties intended to make it so: *Roberts* v. *Berry* (1853), 3 D. M. & G. 291. This rule is clearly reasonable. If, for example,

the purchase is to be completed six weeks after the exchange of contracts, and the date for completion is not made of the essence of the contract, the deferment of the completion for a further period of one week owing to a delay by the vendor in delivering the abstract for a like period is not likely to be a matter of moment by either party. If, however, the vendor fails to deliver the abstract within a reasonable time, or, if a time for delivery of the abstract is prescribed by the contract, within a reasonable period after the agreed date, then the purchaser is entitled to rescind the contract even if a satisfactory abstract is ultimately delivered. Thus, in *Venn* v. *Cattell* (1872), 27 L. T. 469, the abstract should have been delivered within twenty-one days after exchange of contracts but was not delivered for 118 days. After the expiry of 78 days from the date of the sale the purchaser had given notice purporting to repudiate the contract. Upon delivery of the abstract the vendor claimed specific performance of the contract; but it was held that the purchaser's notice was effective; see also *Compton* v. *Bagley*, [1892] 1 Ch. 313.

If the purchaser desires to avail himself of the right to rescind the contract on account of the vendor's delay, he should return the contract when it is delivered: *Hipwell* v. *Knight* (1835), 1 Y. & C. Ex. 401; *Seton* v. *Slade* (1802), 7 Ves. 265; *Pegg* v. *Wisden* (1852), 16 Beav. 239. Generally there is no provision in the contract making time of the essence of the contract, and therefore, unless the purchaser serves a reasonable notice requiring its delivery, he cannot object if the vendor makes default. It would appear from *Guest* v. *Homfray* (1801), 5 Ves. 818 that the purchaser is bound to ask for the abstract, if it is not delivered. If time is of importance to the purchaser, and the abstract is not forthcoming within a reasonable time, he should therefore notify the vendor that if the abstract is not delivered within, say, fourteen days after the date fixed for its delivery he will rescind or that he will reserve all his rights under the contract, including the right to rescind the contract, on the ground that time has become of the essence of the contract by virtue of such notice. If as a result of further delay the purchaser decides to rescind he should do so immediately after the expiry of the time specified in the notice. He is not at liberty to proceed with the negotiations after delivery of the abstract, and thereafter to rescind, unless the negotiation is without prejudice. And it is apprehended that such negotiations, even if "without prejudice", cannot be unduly prolonged, for the right of rescission must be exercised with all reasonable speed: *Webb* v. *Hughes* (1870), L. R. 10 Eq. 281; and compare *Boyes* v. *Liddell* (1842), 6 Jur. 725; *Warde* v. *Jeffery* (1817), 4

Price 294; *Murrell* v. *Goodyear* (1860), 1 De G. F. & J. 432; *Hoggart* v. *Scott* (1830), 1 Russ. & M. 293. Even after such negotiations, however, the purchaser may clearly give a substituted notice, reasonable in point of time, so as to make the time specified in such new notice of the essence of the contract (*Webb* v. *Hughes*, *supra*), and if default continues after the expiry of such notice a new right of rescission will arise. The period of the notice must depend upon the circumstances. If the purchaser by his conduct leads the vendor to take steps which involve him in expense, but then suddenly purports to rescind and thus leave the vendor to bear expenses which he would not have incurred if the purchaser had rescinded when the difficulty arose, he may, even if successful in resisting specific performance, be deprived of costs in any proceedings which result: *Nokes* v. *Kilmorey* (1847), 1 De G. & Sm. 444.

As to time for delivery of requisitions.

It has been remarked above that where the time for completion is not of the essence of the contract, neither is the time for delivery of the abstract in the absence of special stipulation. The position as to the time for delivery of requisitions is not quite so clear. The Law Society's Condition 9 (5) makes time of the essence; but the Statutory Form of Conditions of Sale, which is otherwise similar, omits this provision. The late Mr. Cyprian Williams commented upon this fact in his work "Contract of Sale of Land" as follows: "The object of this stipulation is to preclude all objections to the title which shall not have been taken within the time above specified; but its efficacy is greatly diminished by the fact that time is not made of the essence thereof. . . . The actual effect of the above condition seems to be that the requisitions must be sent in within a reasonable time after the fourteen days above specified, in default of which the title is to be deemed to have been accepted." On the other hand there is the authority of *Oakden* v. *Pike* (1865), 34 L. J. Ch. 620, for the view that time *is* of the essence of such a condition although the condition does not declare it to be so. This case has been accepted by the learned editors of "Dart on Vendor and Purchaser", throughout its various editions, as being a sufficient authority for that view. Unfortunately, *Oakden* v. *Pike* cannot be regarded as too satisfactory an authority. Vice-Chancellor Kindersley in that case not only laid it down as a rule that if a condition of sale required objections to the vendor's title to be delivered within a given time, time was of the essence of the contract, but also said: "If an abstract is not delivered within the time specified, the purchaser has a right to say, 'The vendor

has not performed the conditions, and therefore I repudiate the purchase'." We have seen that there is clear authority for the proposition that the mere non-delivery of the abstract within the specified time is *not* normally a ground for repudiation, and therefore the *dictum* in the same case that time is of the essence in a condition requiring delivery of requisitions within a specified period may also be open to doubt. It is curious that there is little authority upon this rather elementary point; but such authority as is to be found appears to be in favour of the view that (except as to requisitions which are matters of conveyance or which go to the root of the contract) time *is* of the essence of such a condition.

With the greatest respect to Mr. Cyprian Williams the writer is therefore disposed to favour the view that time is of the essence of such a condition, even if not made so by the contract. It is clear that the vendor's solicitor should, as a matter of prudence, and in accordance with long and well-established practice, expressly provide in the contract that time is of the essence of the contract in this respect.

As to requisitions to which the time limit applies, time only runs from the delivery of a "perfect" abstract: *Hobson* v. *Bell* (1839), 2 Beav. 17. As to what is a perfect abstract for this purpose, see remarks under Condition 8. It is not clear from the authorities whether no requisitions whatsoever need be delivered until the vendor has furnished a proper abstract, *i.e.*, an abstract of all documents proper to be abstracted in his possession or control, actual or constructive (*Morley* v. *Cook* (1842), 2 Hare 106; 12 L. J. Ch. 136), or whether the purchaser is bound to take all requisitions and objections which could be taken upon such abstract as is in fact delivered (except those which go to the root of the title or are matters of conveyance). It is prudent, in these circumstances, that the purchaser should frame and deliver his requisitions on the basis that the abstract delivered correctly represents the state of the vendor's title, and contains the whole of the material information concerning that title which the vendor is or will be able to furnish. If upon the delivery of such requisitions within the time stipulated the vendor is in fact able to furnish a further abstract the purchaser will then, subject to any stipulation in the contract, have a further period, similar in point of time to that allowed for the original requisitions, within which to deliver any further requisitions arising out of the new abstract. The original requisitions, except those covered by the further abstract, should be repeated.

If, however, the purchaser instead of objecting to the title calls for further information, he may take such objections as arise

out of the reply to his inquiry after the receipt of such reply: *Blacklow* v. *Laws* (1842), 2 Hare 40.

The period for delivery of requisitions must depend on the exact wording of the condition. The normal provision is that the requisitions are to be sent in within a given number of days *after* the delivery of the abstract. In that case the day of the delivery of the abstract is not included: *Tanner* v. *Smith* (1840), 4 Jur. 310. Thus, the abstract is delivered on March 14 and requisitions are due for delivery within fourteen days after its delivery. The requisitions may be delivered on March 28, although the period from March 14 to March 28 inclusive amounts to fifteen days.

If requisitions are to be delivered, say, one calendar month before the date fixed for completion, the month must be reckoned exclusively of both the day of delivery of the requisitions and the date fixed for completion: see *Ryalls* v. *The Queen*, 11 Q. B. D. 781. Thus completion being due on March 21, the requisitions must be delivered not later than February 20 in such a case.

We have now to consider certain classes of requisitions which need not be delivered within the time limited for delivery of requisitions *on title*. Before dealing with these cases it is desirable to point out that the Law Society's Condition 6 provides that all requisitions and objections as to the title, or evidence thereof, the abstract (or particulars and information in the case of registered land), and the contract (as respects matters not thereby specifically provided for), are to be delivered within the time specified. In *Deighton and Harris's Contract*, [1898] 1 Ch. 458, it was held that a requisition that the person holding the legal estate in a head lease should join in the assurance to the purchaser was treated as falling within requisitions "as to the title particulars conditions or any other matter or thing relating or incidental to the sale". The requisition made in this case was a requisition of the class known as requisitions as to conveyance. It would therefore seem that under the Law Society's Condition even requisitions as to matters of conveyance must be made within the specified period of fourteen days.

Requisitions going to the root of the title.

(a) The purchaser may after the time allowed for requisitions discover *aliunde* defects of title which did not appear and could not be deduced from the abstract or other information supplied by the vendor. He is not precluded by the Law Society's Condition or other common form conditions of sale from maintaining such a requisition: *Warde* v. *Dixon* (1858), 28 L. J. Ch. 315.

(b) The purchaser may also deliver "out of time" requisitions showing that the vendor has no title at all to the property agreed to be sold and has no immediate power either himself to assure, or to procure the assurance to, the purchaser of the subject-matter of the contract.

Where the question at issue involves the determination of the legal effect of an abstracted document, and upon one construction the vendor's title would be good but upon another construction no title would be shown, a requisition raising this point of construction does *not* go to the root of the title, in this sense, and must be taken within the time limited by the conditions of sale. The case of *Re Thompson and Curzon* (1885), 29 Ch. D. 177 is an example of this type of case. There the vendors' title was deduced under the will of their father. By his will the father gave his property to his wife for life and then to his children, with a proviso substituting, in the case of children who might die, their issue. At the date of the sale the testator's wife had died. The question at issue upon the terms of the will was whether upon the death of the testator's wife the children of the testator, all of whom were still living and were the vendors, became absolutely entitled to the property or whether their interests were subject to a limitation over in the event of their death leaving issue. It was decided that any requisition addressed to this point must be delivered within the stipulated period. This may be taken as a typical case. It may well be understood that a vendor is not entitled to obtain the equitable remedy of specific performance if he seeks to force upon the purchaser the obligation to pay the purchase money in circumstances in which it is obvious on the face of the abstract of title that he is not in a position to convey to the purchaser the interest which he has contracted to sell. Where, however, the question is one of construction, or of the legal effect of documents which appear upon the abstract, it is not unreasonable that the purchaser should be bound by a condition that he should raise requisitions thereon within the agreed period.

An example of a case of "no title" is to be found in *Want* v. *Stallibrass* (1873), L. R. 8 Ex. 175. There the vendors were trustees who failed to show that they had any power of sale until the death of a certain person. Objection to the title made after the period allowed by the contract was sustained. In *Bowman* v. *Hyland* (1878), 8 Ch. D. 588 the vendor had contracted to sell the freehold of a property but only had a leasehold interest, which expired soon after the date of the contract. It was considered that this was an objection going to the root of the title. In these cases it is necessary, in effect, to show that the vendor has no title

at all. Thus if the vendor agrees to sell freehold property but omits to exclude the mines, although they are reserved out of the conveyance to him, and the abstract so states, the purchaser must object if at all within the time limited by the contract: *Re Jackson and Haden*, [1906] 1 Ch. 412.

Requisitions as to matters of conveyance.

The distinction between requisitions going to the root of the title and of those which are matters of conveyance is in theory clear, but difficulty may be found in distinguishing between border-line cases. Generally, it may be said that requisitions which are matters of conveyance are confined to requirements which are within the power of the vendor to comply with, either himself or by enforcing against some other person a right vested in the vendor. Such power may subsist by reason of the vendor's interest in the property or by virtue of a power of appointment, or a right of action which will enable the vendor to get in some outstanding legal or equitable estate. Examples of such requisitions are as follows:—

(i) That a mortgagee should be joined in the conveyance: *Sober* v. *Kemp* (1847), 6 Hare 155.

(ii) That an additional trustee be appointed where there is only one trustee for sale, or that trustees for the purposes of the Settled Land Act be appointed: *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

(iii) That an outstanding legal estate be got in by an equitable owner who has contracted to sell such legal estate and is entitled to require the legal estate to be vested in him: *Re Deighton and Harris*, [1898] 1 Ch. 458; *Kitchen* v. *Palmer* (1877), 46 L. J. Ch. 611.

It is impossible completely to segregate the cases dealing with the distinction between requisitions which are matters of conveyance and those which are matters of title from the decisions affecting the right of rescission in the event of the vendor being unable to comply with the purchasers, and it will therefore be desirable to consider in greater detail the cases touching upon the above point when dealing with the vendor's right of rescission.

Requisitions as to misdescriptions.

This class is perhaps more aptly referred to as "objections".

The leading authority is *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339. A reservoir and waterworks were advertised for sale as yielding £60 per year exclusive of the land and building. An objection was raised on the ground that the vendor had no legal

right to continue the supply of water to the properties which were in fact being supplied. It was not revealed by the particulars of sale that these properties were at some distance from the vendor's land and were being supplied pursuant to a yearly revocable licence. The conditions of sale contained two provisions bearing upon this matter.

(i) All objections to the title not delivered within a specified period were to be deemed to be waived.

(ii) Compensation was to be made for any misstatement of the quality, tenure, outgoings or other particulars.

It was held in proceedings by the vendor for specific performance that an objection based on the ground of such a misrepresentation was a sufficient defence to an action for specific performance and moreover that the objection was not one as to title and did not fall within the condition requiring the delivery of objections as to title within a given time.

It will be necessary to deal more fully with the effect of fraud and misrepresentation later; but it should be remarked here that where the conditions of sale require (as in the case of the Law Society's Condition set out above) the delivery of objections as to " the title or evidence thereof " it would probably be essential, if the purchaser is to object effectively, that he should do so within the prescribed period after receiving an abstract disclosing such a position as existed in *Price* v. *Macaulay* (*supra*). This would also seem to be the case if the condition extended to objections arising out of the " particulars of sale " as well as objections to " title ".

The decision in *Price* v. *Macaulay* proceeded upon the footing that the condition did not extend to objections as to misdescriptions in the particulars.

Waiver of period for requisitions.

If the vendor's solicitor, upon receipt of requisitions or objections delivered after the specified period, desires to advance matters without waiving his client's rights he should be careful to reply to such requisitions or objections " without prejudice ". Otherwise correspondence during which the points raised by the purchaser are discussed may amount to a waiver of the time limit for all the purposes of the contract: *Cutts* v. *Thodey* (1842), 6 Jur. 1027; 13 Sim. 206. Generally, conditions regarding requisitions contain a provision to the effect that in so far as the purchaser does not take objections or make express requisitions the title is deemed to be accepted, and it would seem to be the better opinion that this rule must obtain, where the time for requisitions is

limited, even in the absence of an express provision to that effect. In the case of *Lane* v. *Debenham* (1853), 11 Hare 188, the contract contained both a time limit for delivery of requisitions and an express statement that subject to any requisitions delivered within the time fixed the title was to be deemed good. The purchaser within the fixed time took an objection, intimating that he did not reject the title but wished to know how the vendor met the difficulty. The vendor at first contended that the purchaser, not having rejected the title, was bound by the condition. Later, however, he entered into correspondence upon the matter in issue. It was held that by such correspondence the vendor had waived his right to take advantage of the condition. See also *Morley* v. *Cook* (1842), 2 Hare 106; 12 L. J. Ch. 136 to the like effect.

Waiver of requisitions by purchaser.

The purchaser may by his conduct waive his right to object to the title. In general, entry into full possession of the property is construed as strong evidence of acceptance of the title. It has already been necessary to refer in detail to the cases dealing with this point in connection with Condition No. 6 of the Law Society's Conditions ("Possession before completion"). The essential point which is to be borne in mind is that although the "bare fact of taking possession has over and over again been held not to be a waiver of objections to title" (*per curiam* in *Re Barrington, ex p. Sidebotham* (1835), 2 Mont. & A. 146; 4 L. J. Bkcy. 122), the purchaser must be particularly careful not to do any act which can only be explained on the basis that he has completed or will complete the purchase. The carrying out of even minor works to the property may in the absence of a provision authorising the taking of possession debar the purchaser from taking any objection to the title, or result in a presumed waiver of outstanding requisitions: *Hyde* v. *Warden* (1877), 3 Ex. D. 72.

The delivery of the draft conveyance without reference to outstanding requisitions is *prima facie* evidence of acceptance of title. In *Burroughs* v. *Oakley* (1819), 3 Swan. 159, Plumer, M.R., said: "The preparation of the conveyance in this case is an important fact as amounting to evidence that the parties had arrived at a stage of proceedings subsequent to the question of the title and must be supposed therefore to have removed or abandoned all objections. But I cannot satisfy myself that that fact alone, in the circumstances of this case, is sufficient to exclude the common equity." In that case the purchaser had not only submitted the draft conveyance but had entered into possession and exercised

certain acts of ownership; but questions arising upon the title were still under discussion.

Condition 9 (3).

The object of this paragraph is to compel the purchaser to deliver all objections or requisitions on the basis that the abstract delivered is in fact as perfect an abstract as the vendor can supply and to prevent the purchaser from taking the point, after expiry of the time limited for delivering requisitions, that the abstract was not in fact complete and that therefore the time for delivery of requisitions arising thereout had not commenced to run. In successive editions of " Williams on Vendor and Purchaser " doubt has been cast upon the efficacy of this provision, but it would be unsafe to assume that it is ineffective. It by no means follows that the vendor could by such a condition force the purchaser to accept such interest as he had in a property instead of the interest which he had contracted to convey.

Time may, however, be of some importance to the vendor even if it is not of the essence of the contract, and if a purchaser has expressly agreed that he will not take the point that time does not begin to run until the delivery of a perfect abstract, *i.e.*, the best abstract which the vendor can furnish, but will deliver his requisitions upon such abstract as is delivered, he can hardly be heard to complain, if he is held to be bound by the terms of the contract, at any rate in respect of technical defects.

Condition 9 (4).

This paragraph should not be overlooked by the purchaser's solicitor. The period allowed by this paragraph is short if, as sometimes happens, it is necessary to submit the vendor's answers to counsel for his opinion, or the answers require careful consideration or verification by surveyors or others advising the purchaser. The safe course in all cases where the vendor's answers cannot be replied to immediately in detail is to advise the vendor's solicitors at once in writing that the requisitions are repeated, but without prejudice thereto the purchaser is prepared further to consider the replies, and may have some further suggestion to make if the vendor is willing to await a further communication. Any such further communication should be expressed to be without prejudice to the requisitions in question, and if it includes a proposal for rectification of the title or the doing of other acts it will be prudent and desirable to fix a time limit. Time should be expressed to be of the essence of the arrangement.

It has already been pointed out that the purchaser, upon discovering that the vendor is not in a position to convey or compel the conveyance to the purchaser of the interest agreed to be sold, should act promptly if he desires to repudiate the contract on that ground: see *The Conveyancer*, No. 1, September, 1936, pp. 24, 25.

This rule should be borne in mind when the replies to requisitions are such as to show that the vendor has no present right or power to assure or require the assurance of the property to the purchaser. As Mr. Justice Parker said in *Halkett* v. *Dudley*, [1907] 1 Ch. 590, "I think it is reasonably clear on the authorities quoted to me that before decree" [*i.e.*, of specific performance] "a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may, except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase money, repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial." His Lordship, however, pointed out that this right is an equitable right arising from want of mutuality, and in order to avail himself of it the purchaser must repudiate as soon as he discovers that the vendor cannot make a good title.

Before leaving the subject of requisitions it may be mentioned that the vendor's solicitor occasionally agrees to an extended time for the delivery of requisitions. It would seem clear that a vendor's solicitor has no implied authority to do this, and it is therefore suggested that it is the duty of the vendor's solicitor, before agreeing to an extension, to obtain his client's instructions. The vendor may be unwilling to afford the purchaser the opportunity of creating delay and difficulty by raising awkward requisitions which would not have occurred to his solicitor during a less leisurely perusal of the abstract! There are, however, many cases in which an extension would be desirable. It is suggested that a general objection that "the abstract does not disclose title in accordance with the contract" would not suffice to "hold the fort", if the purchaser were forced to comply with the contract provision as to time and later sought to justify detailed requisitions not going to the root of the title; but the writer is not aware of any specific authority for this view. Possibly readers of these articles may have some observations to make upon the suggestion here put forward. The point is an interesting one.

Law Society's Condition.

Rescission.

10.—(1) If a purchaser shall take or make any objection or requisition as to title, conveyance or otherwise which the vendor is unable, or, on the ground of difficulty, delay or unreasonable expense, unwilling to remove or comply with, and shall not withdraw the same within ten days after being required, in writing, so to do, the vendor may (subject as provided in section 42 (8) or section 125 (3) of the Law of Property Act 1925) by notice, in writing, delivered to the purchaser or his solicitors, and notwithstanding any intermediate negotiation or litigation, rescind the contract.

(2) If the contract is so rescinded the vendor shall repay to the purchaser his deposit (but without interest) and the purchaser shall return all abstracts and papers in his possession belonging to the vendor and shall not have any claim against the vendor for costs, compensation or otherwise.

In the absence of any special provision the vendor has no right of rescission unless indeed the purchaser expressly or by his conduct, active or passive, wrongfully repudiates the contract. In short it may be said that in this respect the general principles of contract law apply.

As to the right of the vendor to rescind on account of "passive" repudiation by the purchaser, see pp. 23 and 24 of *The Conveyancer*, No. 1.

Before dealing with the effect of express conditions enabling the vendor to rescind the contract it may be better to dispose of the references in Law Society's Condition No. 10 to the Law of Property Act, 1925. It will be noted that the operation of this condition is subject to the statutory provisions following :—

Law of Property Act, 1925, *s.* 42 (8).

In order to explain the application of sub-section 8 it is necessary first to set out the short effect of the earlier part of this section. The section referred to renders void stipulations as to the following matters :

(1) That a purchaser shall accept a title made with the concurrence of a person entitled to an equitable interest if title can be made free from the equitable interest without

such concurrence under the Settled Land Act, 1925, or any other statute, or under a trust for sale.

(2) That a purchaser shall pay or contribute towards the costs of a vesting order or the appointment of trustees of a settlement or of a conveyance on trust for sale, or of preparing, stamping or executing a conveyance on trust for sale or of a vesting instrument for bringing into force the provisions of the Settled Land Act, 1925.

(3) That the purchaser shall pay the expense of tracing or getting in of any legal estate, or shall take no objection in respect of such outstanding legal estate.

The section also declares that where the subject of any contract for the sale or exchange of land is

(i) A mortgage term and the vendor can convey the fee simple or the leasehold reversion as the case may be, the contract will be deemed to extend to the fee simple or leasehold reversion.

(ii) An equitable interest capable of subsisting as a legal estate, *e.g.* an equitable fee simple, and the vendor can vest the legal estate in himself or the purchaser or can require it so to be vested the contract will be deemed to extend to the legal estate.

(iii) An entailed interest in possession and the vendor can vest the fee simple or the legal term of years absolute (as the case may be) in himself or the purchaser, or require it so to be vested, the contract will be deemed to extend to the fee simple or term of years absolute.

It must be noted that there is a distinction between this group of cases and the preceding group. As to the former group, any stipulation to the contrary is void; but as to the group just enumerated it might be thought that there is nothing to prevent the vendor from stipulating that the contract shall not be deemed to extend to the legal estates in question, for the section does not declare that any stipulation to the contrary is void. It will, however, have been noted from paragraph (3) above that any condition precluding the purchaser from taking any objection in respect of an outstanding legal estate is void. It would therefore seem that section 42 (3) (reproduced in paragraph (3) above), when read with section 42 (4) (reproduced in paragraphs (i), (ii) and (iii) above), operates to prevent any contracting out of the section, as any negation of the rules enunciated in paragraphs (i), (ii) or (iii) would preclude the purchaser from taking an objection in respect of an outstanding legal estate.

Sub-section 8 of this section provides that "a vendor shall not have any power to rescind a contract by reason only of the enforcement of any right under this section".

But for this provision the vendor might say: "It is true that this section prevents me from precluding objections based on the outstanding legal estate, but this is an objection which I am unwilling to remove, and therefore I shall rescind the contract in accordance with the condition enabling me to do so." It seems probable that sub-section 8 invalidates any condition which purports to allow the vendor to rescind in the event of the purchaser insisting upon his rights under the section. The writer does not understand why sub-section 8 does not expressly state that any stipulation purporting to entitle the vendor to rescind the contract by reason of the enforcement of any right under the section shall be void. It would, however, seem that this must be the intention as in the absence of an express rescission clause it is obvious that the vendor could not possibly rescind the contract on account of the insistence by the purchaser upon his statutory rights. It is, however, *possible* that a declaration in the conditions of sale that sub-section 8 shall not apply is effective. It is a well settled principle that provided there is nothing unlawful in the nature of the bargain a party may by contract deprive himself of any right or privilege conferred upon him by statute save only in such cases as "contracting out" is forbidden by the statutory provision in question.

Law of Property Act, 1925, *s.* 125 (3).

Section 125 contains certain provisions requiring the filing of powers of attorney executed after December 31, 1925, and entitling the purchaser, notwithstanding any stipulation to the contrary, to the original power of attorney or an office copy thereof. Sub-section 3 enacts that no right to rescind a contract shall arise by reason of the enforcement of the provisions of this section.

As in the case of section 42 (8) it would seem that this limitation of the right of rescission must apply to express powers and the observations made above as to the form in which that sub-section is couched apply with equal force to section 125 (3).

The provisions above dealt with are not the only statutory provisions which cannot be modified by contract but they appear to be the only ones in which it is stated that the vendor's right of rescission is not to be exercisable on the ground that the purchaser is insisting upon his statutory rights.

Thus section 43 of the Law of Property Act, 1925, provides that notwithstanding any stipulation to the contrary the purchaser of

a legal estate may require the registration of pending actions, land charges, etc., affecting the land to be cancelled or the concurrence of the person entitled to the equitable interest so protected. If, however, the cancellation of the registration or the concurrence cannot be procured the section expressly states that the right of any person to rescind the contract is not to be affected. Subject to the statutory provisions above mentioned, the vendor may therefore, in general, reserve an effective right of rescission in respect of all matters with which he is "unable or unwilling" to comply.

The Law Society's Condition No. 10 obliges the vendor, before rescinding, to require the purchaser, in writing, to withdraw his objection or requisition. The purchaser then has ten days within which to decide whether to withdraw it. If he does not do so then the vendor can rescind.

The Condition may, however, merely state that "if the purchaser shall make any objection or requisition which the vendor shall be unable or unwilling to comply with the vendor shall be at liberty to rescind the contract". It is curious that equity has been unable to assist a purchaser in such circumstances, but it is clear that a clause of this kind (which should never be accepted) affords no opportunity to the purchaser to reconsider his position. If it is in fact difficult for the vendor to comply with any particular requisition this Condition will enable him to cancel the contract at once. Thus the purchaser has no *locus pœnitentiæ*, but makes his requisitions or objections at the risk of an immediate notice rescinding the contract. As was said by Turner, L.J., in *Duddell* v. *Simpson*, L. R. 2 Ch. 102, and subsequently approved by Cotton, L.J., in *Re Dames and Wood* (1885), 29 Ch. D., at p. 629, to lay down the rule that the vendor must give notice before determining the contract would be to introduce a new term into the contract, namely, that the vendor may annul the contract by giving a specified period of notice to enable the purchaser to determine whether he will withdraw the requisition or objection. The Law Society's Condition, as will be seen, contains such a provision. If the Condition gives a right of rescission if the purchaser "insists upon" (not *makes*) a requisition, the position is different. Lord Justice Cairns observed in *Duddell* v. *Simpson* (1866), 2 Ch. App. 102, that in such cases there must be: (i) an objection; (ii) an inability or unwillingness to remove the objection; (iii) a communication to the purchaser of such inability or unwillingness; (iv) an insistence by the purchaser on his objection notwithstanding this communication. See also *Greaves* v. *Wilson* (1858), 25 Beav. 290, where the vendor was held to be bound in such a case to

answer requisitions even if untenable. It was also held in the same case that the vendor could not rescind the contract merely on the ground that he was unwilling to obtain the concurrence of the mortgagee.

The vendor cannot openly flout the contract by the exercise of a right of rescission. In whatever form the condition is couched it cannot be exercised arbitrarily or in bad faith, and it was said by Cotton, L.J., in *Re Dames and Wood* (*supra*) that the vendor must show some reasonable ground for his unwillingness to answer a requisition. This observation should, however, be read subject to the decision in *Re Starr-Bowkett Building Society, etc.* (1889), 42 Ch. D. 375, where the contract contained a similar condition, and the vendor trustees resolved that as certain requisitions could not be complied with and others would involve great trouble and expense, the contract should be rescinded. Notice of rescission was thereupon served upon the purchaser, no replies being made to the requisitions at all. It was held that the vendors were under no obligation to specify the ground on which they were rescinding except that they were unwilling to comply with the requisitions. Although the word "unwilling" must be interpreted as "reasonably unwilling", it appears from the same decision that where there is no evidence of caprice or *mala fides*, the Court must assume that the vendor is acting reasonably. The reasonableness or otherwise of the vendor's action may, however, be deduced from the circumstances. The question whether a certain trust for sale had become exercisable depended upon whether A had died leaving a child. The purchaser required the vendor to state the date of birth of any child of A living at A's death. The vendor had not the necessary information but could readily have obtained information from one of the children or from certain solicitors, who were known by the vendor to act for the other children, but refused to comply with the requisition and purported to rescind the contract. The notice was held to be unreasonable and specific performance was decreed: *Quinion* v. *Horne*, [1906] 1 Ch. 596.

The vendor is not bound to specify his reasons for rescinding the contract (*Re Glenton & Saunders to Haden* (1885), 53 L. T. 434); but it must be remembered that the requisitions will be before the Court and if reasonable requisitions have been delivered which could be complied with without considerable expense, and no explanation is offered, the Court may be constrained to assume that the rescission is capricious and therefore invalid. Cf. *Steer* v. *Crowley* (1863), 14 C. B. (N.S.) 337.

The usefulness and efficacy of a power of rescission are well illustrated by the case of *Ashburner* v. *Sewell*, [1891] 3 Ch. 405,

in which the purchaser required compensation in respect of a right of way which was not disclosed by the contract. It was held that the right of way was a defect which enabled the vendor to rescind upon the ground that the purchaser was insisting upon a requisition as to title with which the vendor was unable to comply. So in *Vowles* v. *Bristol Building Society* (1900), 44 Sol. J. 592, where land was described as an "eligible building site", the existence of a sewer which ran across the land formed the subject of an objection by the purchaser. The right of rescission was considered applicable in such circumstances, notwithstanding the existence of a compensation clause in respect of errors, etc.

It will readily be seen that if the rescission clause and the compensation clause are not carefully reconciled, conflict may easily result. On the one hand the rescission clause may permit rescission if any requisition or objection is taken, and on the other hand the compensation clause may provide that compensation shall be paid in respect of any error or misstatement. In the case of the Law Society's Conditions there is no provision in the clause dealing with compensation for misdescription (Clause 31) to the effect that the vendor may, or may not, rescind the contract and thus avoid the payment of compensation. It will be necessary to deal more fully with the subject of compensation later and in that connection to consider in what circumstances specific performance will be decreed subject to compensation. The Law Society's Condition as to rescission extends not only to objections or requisitions as to title but also as to "conveyance or otherwise". On the authorities this Condition may be construed by reference to the clause dealing with the delivery of requisitions : *Re Terry and White* (1886), 32 Ch. D. 14, and cf. *Kitchen* v. *Palmer* (1877), 46 L. J. Ch. 611. Clause 9 of the Law Society's Conditions requires the purchaser to deliver within a specified period objections and requisitions as to :

(i) The title or evidence of title;
(ii) The abstract, or, in the case of registered land, the particulars required to be furnished in lieu of an abstract;
(iii) The contract as to matters not thereby specifically provided for.

It would therefore seem that practically all objections taken in respect of matters giving rise to a claim for compensation must fall within one of the three classes above mentioned. Consequently the rescission clause would appear to enable a vendor (subject to the exceptions mentioned later) to rescind the contract even though under the compensation clause he has agreed to compensate the purchaser in respect of any deficiency or other error in the particulars of the property.

The vendor cannot, however, exercise his right of rescission if the error or misstatement in respect of which compensation or damages is sought should come within any of the following categories :

(a) Errors or defects known by the vendor but not disclosed at the time of the contract, unless the vendor had reasonable ground for thinking that the defect could be remedied.

Land was sold without any condition precluding objections as to the reservation of minerals. The vendors believed that it was general knowledge that the minerals were reserved. It would, however, have been a simple and obvious matter to cover in the conditions of sale, and although strictly a matter of title within the condition for rescission, the vendors were compelled to allow specific performance with compensation in accordance with the separate condition allowing compensation for errors or misstatements : *Re Jackson and Haden*, [1906] 1 Ch. 412. So where the vendor had not the legal estate in certain property but hoped to obtain the concurrence of the trustee, and after lengthy negotiations the purchaser required certain applications to be made to the Court so as to put the title in order, the vendor was not allowed to rescind, but having acted recklessly was bound to comply with the requisition: *Re Des Reaux and Setchfield*, [1926] Ch. 178.

The Court will not, however, burden the vendor with long and expensive matters of inquiry where controversial questions are involved as a result of which the vendors may or may not be able to comply with the requisition : *Mawson* v. *Fletcher* (1870), 6 Ch. App. 91.

Again, if the vendor has made a statement in the contract in reliance upon the promise of a third party, even though such promise is not legally binding, the vendor is not deemed to have made such statement recklessly: *Merrett* v. *Schuster*, [1920] 2 Ch. 240. "A vendor ought not to be held disentitled to exercise a clear and unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold if the statement was made under the *bona fide* belief and with some substantial ground for believing that it was true" (*ibid*).

The case of *Procter* v. *Pugh*, [1921] 2 Ch. 256, carried this principle even further, for in that case a vendor was

allowed to rescind and thus escape payment of the purchaser's costs of investigation of title where the objection was in respect of restrictive covenants not disclosed at the time of the contract. Usual and proper examination of title prior to contract would have disclosed these covenants, and the vendor might well have been considered to have acted so recklessly as to disentitle him to exercise his right of rescission. It would seem, if *Procter* v. *Pugh* was rightly decided that the right of rescission will probably now be considered to be properly exercisable in all cases where the error is a genuine mistake not being of such a kind as to amount to a reckless disregard of known facts or defects. Practising lawyers will be aware that the lay owner of land has but the vaguest notion of the restrictive covenants affecting the land which he owns, and very often is quite unaware of the effect or even of the existence of such covenants. Generally, therefore, moral turpitude or reckless disregard of the facts can hardly be imputed to a vendor who fails to mention (or possibly to remember) that there are restrictive covenants affecting land which he is selling, unless specific inquiry is made before the sale.

That distinguished conveyancer, the late Mr. Cyprian Williams, was of the very strong opinion that if *Procter* v. *Pugh* (*supra*) was rightly decided, it could only be supported on the ground that the purchaser had not acted quickly enough in repudiating the contract. In Mr. Williams' view the making of requisitions and the request for the removal of the restrictions (instead of repudiating the contract at once), destroyed the purchaser's right to repudiate altogether. Sargant, J., did not, however, decide the case on this ground, but merely adopted the view of Parker, J., in *Halkett* v. *Dudley*, [1907] 1 Ch. 590, that a purchaser, on becoming aware of an irremediable defect in the vendor's title may repudiate so as to bar *the vendor's right to claim specific performance*. Sargant, J., pointed out that if repudiation in such a case automatically destroyed the vendor's right of rescission (thus entitling the purchaser to recover as damages the costs and expenses of investigating the title), the rescission clause would be nullified, for the object of that clause is to preclude the purchaser from recovering anything more than his deposit in the case of any flaw in the title which the vendor is unable or unwilling upon a reasonable ground to remedy.

The other ground on which the learned Judge held in favour of the vendor was that there had been no recklessness on the vendor's part in that case. "The property was known to be subject to restrictive covenants; but that did not affect his power to give the purchaser a habitable house. It is sometimes for the benefit of a house in a residential property that there should be restrictive covenants affecting that property." Mr. Cyprian Williams' criticism of this decision may be found in two lengthy articles in the *Solicitors' Journal* (1921), Vol. 66, pp. 119 to 121 and 135 to 138; but the writer prefers the reasoning in the judgment, upon the ground that material misrepresentation or reckless disregard of the facts can hardly be imputed to a vendor who fails to mention that there are restrictive covenants protecting the amenities of land occupied for residential purposes, unless specific inquiry is made before the sale and the vendor gives an untrue reply knowingly, or without troubling to refer to the title deeds. See also *Re Simpson and Moy's Contract* (1909), 53 S. J. 376, where a vendor who had through oversight failed to disclose a rentcharge was held to be entitled to exercise a power of rescission.

(b) The vendor will be unable to exercise his right of rescission if he fails to show any title at all to the property: *Bowman* v. *Hyland* (1878), 8 Ch. D. 588. If, however, the vendor purporting to sell five acres shows a good title to three and one half acres, but as to the remainder can only show a possessory or other insufficient title, this is not a case in which "no title" at all is shown. In the absence of *mala fides* the vendor can in such a case rescind if the purchaser insists upon a good title being shown: *Heppenstall* v. *Hose* (1884), 51 L. T. 589.

(c) Intentional misrepresentation or suppression of material facts or any other fraudulent conduct inducing the contract will also deprive the vendor of his right to exercise a power of rescission. Thus in *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203 specific performance with compensation was decreed, notwithstanding a power of rescission in the contract, upon the ground that the vendor had purported to sell the property without the consent of his mother, who, as he well knew, was the tenant for life. Again, "a Court of equity would not permit a vendor who had a good title and the means of showing such title on his abstract, fraudulently to deliver an imperfect abstract to which objections would

necessarily be taken, and upon these objections being taken avail himself of his own fraud to avoid his contract under the condition" : per Wigram, V.-C., in *Morley* v. *Cook* (1842), 12 L. J. Ch. 136; 2 Hare 106. As to intentional misrepresentation, see *Price* v. *Macaulay* (1852), 2 D. M. & G. p. 347.

In *Smith* v. *Wallace*, [1895] 1 Ch. 385, where the vendor used his power of rescission as a means of negotiating with another potential purchaser, the purchaser was held to be entitled to repudiate the contract and was allowed interest at 4 per cent. on the deposit.

Where the property is subject to a rentcharge the Court will allow the vendor to rescind under such a power if the result of requiring him to pay the redemption moneys into Court would be to inflict great hardship on the vendor; for example, where the amount required to redeem the rentcharge would be greatly in excess of the purchase price : *Re Great Northern Ry. and Sanderson* (1884), 25 Ch. D. 788.

It will be seen that the Law Society's Condition enables the vendor to rescind notwithstanding any intermediate negotiation *or litigation*. This condition enables the vendor to rescind at any stage prior to judgment in respect of the matter in question : *Re Arbib and Class*, [1891] 1 Ch. 601. If the vendor takes proceedings for specific performance he may nevertheless, after causing his action to be dismissed and (generally) paying the costs, exercise his power of rescission: *Warde* v. *Dixon* (1859), 28 L. J. Ch. 315, 322. Under a similar condition, if the purchaser is the party taking proceedings for specific performance, the vendor may rescind after such proceedings have been commenced, and accordingly the purchaser continues such proceedings after receipt of notice of rescission at his peril. If the notice is held to be effective the purchaser will be compelled to pay the costs as from the date when the notice was served on him: *Duddell* v. *Simpson* (1866), 2 Ch. D. 102. On the other hand, if the vendor allows the purchaser to proceed with his action without taking any step to rescind the contract until a late stage of the proceedings the Court may order the payment of the costs needlessly incurred by this conduct, notwithstanding that the condition provides only for the return of the deposit in the event of rescission, "without any interest costs of investigating the title or other compensation or payment whatsoever" : *Re Spindler and Mear*, [1901] 1 Ch. 908.

The absence of any reference in the condition to "litigation" will prevent the vendor from rescinding after taking proceedings for specific performance, so far as concerns any outstanding requisi-

tions : *Gray* v. *Fowler* (1873), L. R. 8 Ex. 249. It will also prevent a vendor from rescinding after the purchaser has taken proceedings for specific performance unless the notice is served immediately upon the issue of process or very shortly thereafter, but the vendor will normally be ordered to discharge the purchaser's costs up to the date on which notice of rescission was given : *Isaacs* v. *Towell*, [1898] 2 Ch. 285. If speedy action is not taken after commencement of the purchaser's suit, but a defence is put in by the vendor he may be deemed to be submitting to the jurisdiction of the Court. In *Sheard* v. *Venables* (1867), 36 L. J. Ch. 922, where the vendor himself sought specific performance his action was held to amount to a submission to the jurisdiction, so as to prevent him from rescinding thereafter. And see *Gardom* v. *Lee* (1865), 3 H. & C. 651.

Generally, the vendor cannot " blow hot and cold ". He cannot after advising the purchaser that he can deal with the requisitions and thus causing the purchaser to await the clearance of the outstanding points, rescind on the ground that he is unwilling to comply with the requisitions, unless the condition is framed so as to permit rescission notwithstanding any negotiation : *Tanner* v. *Smith* (1840), 10 Sim. 410; *Re Deighton and Harris*, [1898] 1 Ch. 458. The vendor does not, however, lose his right to rescind by making a specific offer designed to meet an objection : *Re Milner and Organ* (1920), 89 L. J. Ch. 315.

As to loss of the right of rescission by delay, see *Gray* v. *Fowler* (1873), L. R. 8 Ex., at p. 281. The vendor is not necessarily precluded from rescinding by reason of the fact that the date for completion has passed, at any rate, if time is not of the essence of the contract : *St. Leonard's, Shoreditch, Vestry* v. *Hughes* (1864), 17 C. B. (N.S.) 137.

(To be continued.)

COSTS INCURRED ON NOTICE OF FORFEITURE OF A LEASE.

By Lionel A. Blundell, LL.M., of Gray's Inn, Barrister-at-Law.

A correspondent has raised an interesting practical point with reference to the costs incurred by a lessor in the employment of a solicitor and surveyor for the purpose of serving a notice under section 146 of the Law of Property Act, 1925. The lessor served a repairing notice in the usual form specifying the breaches and a time for remedy and claiming money compensation for the breach. The lessee performed the repairs within the time specified, but refuses to pay the solicitor's and surveyor's costs which the lessor claims from him. Can the lessor recover those costs from the lessee in such a case? The point is not an easy one to decide and requires a careful examination both of the provisions of section 146 and of decided cases bearing on the question.

The effect of the section may for clarity be stated in this way. A right of re-entry reserved under a lease is not enforceable until,

(i) the lessor has served on the lessee a notice specifying the breach complained of, requiring the lessee to remedy the breach if it is capable of remedy, and "in any case" requiring the lessee to make compensation in money for the breach; and

(ii) the lessee has failed within a reasonable time to remedy the breach if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

A notice is not bad for not requiring compensation in money (*Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L. J. Ch. 582, C. A.; *Civil Service Co-operative Society* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; 92 L. J. Ch. 616; *Rugby School* (*Governors*) v. *Tannahill*, [1935] 1 K. B. 87; 104 L. J. K. B. 159, C. A.), and so compensation need not be asked for if it is not desired. Where compensation is required, however, it is not expressly made clear by the Act whether the right of re-entry is to be enforceable if the lessee performs one only of the two things he is required to do, for example, remedies the breach but does not make reasonable compensation in money. It might conceivably be suggested that

the words "has failed" are to be understood as repeated before the words "to make reasonable compensation", so that the right of re-entry will not be enforceable in the case suggested, because the lessee has not failed to remedy the breach *and* has failed to make reasonable compensation. He has only failed in one of those duties. This construction is, however, undoubtedly incorrect. No reported case is known in which the point arose expressly for decision, but it is clear from the words used by the Court of Appeal in *Skinners' Company* v. *Knight*, [1891] 2 Q. B. 542, and in *Rugby School (Governors)* v. *Tannahill*, [1935] 1 K. B. 87, that the section places a double duty upon the lessee which he must perform if he is to avoid a forfeiture. In the latter case, Maugham, L.J. says, at p. 93, "A partial remedy is not within the section, the concluding words of sub-section 1 being: 'and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.'" If the lessee omits to do either of those things then there has been a failure on his part in carrying out the duty which is cast upon him if he wishes to avoid a forfeiture, and so the right of re-entry has become enforceable.

Section 146 (2) provides for the lessee's right to apply to the Court for relief, and gives the Court a discretion to refuse or grant relief upon such terms as it may think fit, having regard to all the circumstances.

Sub-section 3 gives a landlord a right in certain specified cases to recover from the tenant the costs of a solicitor and surveyor. The lessor can recover as a debt due to him from the lessee (in addition to any damages to which he may be entitled) all reasonable costs and expenses properly incurred by him in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of the Act. It is to be observed that this clause is not limited to the costs of the notice, but extends to all costs properly incurred "in reference to" the breach. Relief under the provisions of the Act means relief by the Court under its equitable jurisdiction to relieve from a penalty or forfeiture which has been incurred: see *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226, C. A. It follows that in the absence of a waiver by the landlord at the request of the tenant, the landlord can only avail himself of the right conferred by sub-section 3 in a case where the right of re-entry reserved by the lease has become enforceable under sub-

section 1 and, the landlord having taken steps to enforce his right of re-entry, the tenant has been granted relief by the Court under sub-section 2. The tenant who complies fully with the notice served upon him, performing the repairs specified and making reasonable compensation in money if it is required, cannot be compelled under sub-section 3 to pay the costs of employing a solicitor and surveyor. Where, however, the tenant complies with part only of the notice, for example, where he carries out the repairs but fails to make reasonable compensation in money, then, applying the construction which, it has been seen above, is to be placed upon sub-section 1, the right of re-entry becomes enforceable. Now, in the example taken, although the repairs have been executed, there has been a failure on the part of the lessee to carry out his repairing covenant and the lessor is therefore entitled to commence a forfeiture action. The lessee will of course be able to obtain relief by paying reasonable compensation, but the lessor will now be entitled to recover as a debt his reasonable expenses of employing a solicitor and surveyor or valuer. In practice the payment of such expenses by the lessee will usually be made a condition of the grant of relief: see for instance *Bond* v. *Freke*, [1884] W. N. 47. In such a case, therefore, solicitor's and surveyor's costs will be recoverable from the tenant notwithstanding that he has executed the repairs in accordance with the notice; but section 146 does not provide any method of recovering such costs where the tenant has complied with the whole of the notice served upon him.

It has, however, been suggested that in cases where the lessor cannot recover such costs as a debt due under section 146 (3), they may nevertheless be claimed from the lessee in the shape of damages for breach of covenant. It may be said that they result directly from the tenant's breach, for if the tenant had never been in default no notice would have been necessary and no solicitor's or surveyor's costs would have been incurred. The words of Lord Herschell in *Conquest* v. *Ebbetts*, [1896] A. C. 490, at p. 494, may perhaps be prayed in aid: "I do not think any hard-and-fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of the lease in respect of the breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant." Are not the costs in question to be included as damage which the lessor has sustained by the lessee's breach?

Attractive though this argument is, it cannot be supported either upon principle or upon authority. It is well settled by a long line of cases that the measure of damages for a breach by a tenant of his repairing covenant during the currency of the lease is the extent of the injury to the landlord's reversion; see for example, *Doe* d. *Worcester Trustees* v. *Rowlands* (1841), 9 C. & P. 734; *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79; *Espir and Others* v. *Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91; 80 S. J. 894, C. A. The Landlord and Tenant Act, 1927, s. 18, gives this rule a statutory force, but does not actually supersede the common law: the section merely provides that the damages *shall in no case exceed* the amount by which the value of the reversion is diminished. In other words, the extent of the injury to the reversion is precisely what does reasonably represent the damage which the covenantee has sustained by the breach of covenant. It is recognised, of course, that special considerations affect the amount of injury to the reversion in the case of a breach of covenant by a sub-lessee; it has been decided that where the sub-lessee has notice that there is a superior landlord, the immediate lessor's liability over to that landlord must be taken into account, and the cost of putting the property into repair at the end of the term may properly be considered for that purpose: *Conquest* v. *Ebbetts*, [1896] A. C. 490, affirming [1895] 2 Ch. 377, C. A. This, however, is not an exception to the general rule stated above, but merely a special application of it. The principle that the measure of damages is the amount of injury to the reversion is the governing rule in the case of sub-lessees as well as of head lessees: see *Espir and Others* v. *Basil Street Hotel, Ltd.* (cited above). It is particularly to be noted that the words of Lord Herschell cited above were delivered in a case of a breach of covenant by a sub-lessee who was aware of his immediate lessor's liability to the head lessor.

Applying this definition of the measure of damages to the position which is now under consideration, it is difficult to see how the costs incurred by a lessor in employing a solicitor and surveyor for the purpose of serving a notice under section 146 can properly be described as part of the injury to the reversion. The serving of the notice is a statutory requirement which must be observed before the lessor can exercise his contractual right to forfeit the term. The lessor is not obliged to take steps to enforce his right of re-entry; but if he does he must serve a notice, and no doubt a prudent lessor will employ a solicitor and surveyor to assist him with regard to the preparation and serving of it. Such costs are incurred voluntarily by the lessor in order to enforce one

out of the remedies available to him; they would not have been incurred had he been content to sue merely for damages. It cannot, therefore, be said that they are part of the injury to the reversion caused by the tenant's breach of covenant.

This view is supported by authority. Mayne on Damages, at p. 231 in the tenth edition, deals with the costs of survey incurred by the lessor with reference to a tenant's breach of covenant, and says: "The expenses of survey are usually borne by the landlord, unless there be some special agreement to the contrary. Therefore, in an action for breach of covenant, by the dilapidation of premises, the landlord is not entitled to be allowed the expenses he has been put to in ascertaining what has been the extent of injury sustained." The authority cited by Mayne for this statement is an unreported case, *Logan* v. *Cox*, decided by Field, J., in May, 1876. The costs of preparing a notice under section 146 are, of course, part of the costs of survey which fall under the general rule stated by Mayne.

Moreover, in *Skinners' Company* v. *Knight*, [1891] 2 Q. B. 542, the Court of Appeal held that the "compensation" which a lessee can be required to pay by a notice under section 14 of the Conveyancing Act, 1881, corresponding to section 146 of the Law of Property Act, 1925, does not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor for the purpose of preparing the notice, and in that case Fry, L.J., in delivering the unanimous judgment of the Court used the words, "We incline to the view . . . that compensation under the section in question is to be measured by the same rule as damages in an action for the breach. But whether this be so or no, we are clearly of opinion that the expenses in question are not payable as compensation for the breach of the covenant. They arise, not from the breach of the covenant, but solely from the fetter which the wisdom of the legislature has imposed on the enforcement of the cause of action arising from that breach." It is clear that the Court of Appeal, in deciding that "compensation" under section 146 does not include the costs of employing a solicitor and surveyor for the preparation of the notice, were linking this up to the general principle of law that damages for the breach of a repairing covenant do not include the costs of survey.

The question of damages has been considered only from the point of view of damages at law, because in the circumstances under consideration there cannot be any right to equitable damages: the jurisdiction originated by Lord Cairns' Act, 1858, to give equitable damages applies only where there is a right to the remedy of an injunction or specific performance. It is clear

that where the lessee has, though belatedly, performed his covenant and executed the repairs which it is his duty to do, there can be no right to an injunction or specific performance against him and the lessor's only right to damages is his right to damages at common law.

The conclusion which must therefore be drawn is that the costs of employing a solicitor and surveyor or valuer with reference to a notice under section 146 cannot be recovered from the tenant except where they are expressly made recoverable from him by statute in section 146 (3) of the Law of Property Act, 1925.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Settled Land Act—power of Court to authorise unauthorised transactions.—Re White-Popham Settled Estates, [1936] Ch. 725 is an important authority on the effect of section 64 of the Settled Land Act, 1925, authorising the Court to enable a tenant for life to effect any transaction concerning the settled land which would be valid by an absolute owner. In this case the tenant for life under the trust instrument sought power to raise by mortgage sufficient money to pay off his private debts. These debts were incurred in paying the expenses involved in maintaining the estate. The proposal included a policy of life assurance for a greater sum than that raised and the premiums were to be charged on the rents and profits of the estate. Eve, J., held that the Court had no power to sanction a mortgage of the settled land, but the Court of Appeal reversed this decision. In a very short judgment Lord Wright, M.R. (with whose judgment Romer, L.J., and Greene, L.J., concurred) said that it was not alleged by anyone that the transaction was not desirable and that it was in the interest of all parties that the tenant for life should not be made bankrupt. Consequently, although the order had the effect of diminishing the settled land the Court had jurisdiction.

It should be observed that this decision sanctions transactions affecting the settled land that go outside the maintenance of the settled land. It is therefore in point to observe that the section authorises any transaction "concerning the settled land, or any part thereof, or any other land". The condition laid down by the Act to authorise the order of the Court is that it should be "for the benefit of the settled land, or any part thereof, or the persons interested under the settlement". By virtue of this decision it may be said that the Court can sanction a transaction that will not be for the benefit of the settled land, even effect a diminution, if it is for the benefit of the persons interested under the settlement, thus giving full effect to the disjunctive "or" in the wording of the section.

It is suggested that it will yet be necessary to decide what is the principle for determining whether or not a proposed transaction is for the benefit of persons interested. In this case the scheme was not alleged by anyone to be undesirable and it does not appear from the report whether or not it was in fact opposed by the remaindermen, though of course it was no doubt considered necessary that the argument in opposition was before the Court. Practitioners may, therefore, look for further guidance, since this decision certainly indicates considerable possibilities under section 64 of the Act. It may be pointed out that, apparently, from the report, the debts of the tenant for life were due to expenditure on the settled land. Whether this is a factor for consideration does not appear. It should also be noticed that provision was made for repayment of the loan by the tenant for life or on his death, and this presumably must be regarded as a necessary condition.

Settled land—estate ownership and beneficial interest distinct entities.—Re Liberty's Will Trusts, [1937] 1 Ch. 176, emphasises the distinction between the rights exercised by an estate owner in respect of his legal fee simple and his beneficial interest under the settlement. A life tenant with a determinable life interest under a trust instrument was also estate owner and wished to make certain improvements. Capital money was advanced by the trustees and the estate owner charged the land with repayment by instalments under the Settled Land Act, 1925, s. 85 (1). Subsequently the trustees had some doubt whether all the improvements could properly be met out of the capital moneys and asked the Court whether in respect of the sums improperly advanced the life tenant had forfeited his life interest by charging his equitable interest. Clauson, J., held that the charge had been created by the life tenant as estate owner under the Settled Land Act, 1925, and that therefore he had in no sense charged his beneficial interest though at some future date some one might say that the sum payable under the rentcharge did not include any sums improperly advanced.

It may be noticed that the rentcharge did have the effect of lessening the value of the life interest since the net rents and profits were thereby diminished, but the point was that it was not a charge made in the capacity of life tenant but as estate owner. This distinction may produce further results.

It may also be convenient to observe one or two other points. The view of the learned Judge that the extent of the sum protected by the rentcharge might be challenged is consonant with section 18

of the Act which renders void a disposition not authorised by the Act. Hence it would seem that the rentcharge could be valid only to the extent of sums properly advanced. The rentcharge can be overridden by a disposition of the settled land under the Settled Land Act (see S. L. A., s. 85 (2)), and this lends emphasis to the distinction between estate ownership and beneficial interest, since the sum is in fact charged more on the *corpus* of the trust fund than upon the settled land itself. Again, a rentcharge properly and entirely made to cover advances under the Act could never have the effect of defeating a life interest, because it would be made in pursuance of the Act and so be within section 106 of the Act rendering the defeasance clause invalid to the extent of the exercise of powers under the Act: see *Re Patten*, [1929] 2 Ch. 276.

Mortgage—contribution on assignment of part of the mortgaged property.—In *Re Mainwaring*, [1937] 1 Ch. 96, a mortgagor who had mortgaged certain property under a settlement and also a life policy became bankrupt. His trustee in bankruptcy sold the interests under the settlement and the conveyance was expressed to be subject to the mortage. On the death of the bankrupt the trustee in bankruptcy took out a summons to determine how the mortgage was to be borne as he had retained the life policy. Bennett, J., held that the borrower had no right to indemnity from the assignee of the settlement property, but the Court of Appeal varied this decision by holding that both properties should bear a rateable proportion of the debt. Apparently, the proportion is to be determined at the date of the death of the mortgagor in this case (see *per* Romer, L.J., at p. 105), and consequently from what is there said, the normal period for ascertaining values would be at the date when the mortgage is paid off and not the date at which the assignment is made.

The Court of Appeal distinguished in this case two earlier cases of first instance, namely, *Re Darby's Estate*, [1907] 2 Ch. 465; and *Re Best*, [1924] 1 Ch. 42, in which the assignee had been held to be free from any liability to contribute, apparently on the ground that in neither case had the assignment been expressed to be subject to the mortgage. It is clear, however, that unless released by the mortgagee the property must remain subject to the mortgage whether or not it is so expressed, but the principle, which determines liability to contribute, depends upon the expressed intentions of the parties to the assignment: see *per* Greene, L.J., at p. 107. It is suggested that the assignee's

solicitor, apart from there being a contrary agreement, should in any case of the assignment of part of the property expressed to be subject to a mortgage insert a clause to the effect that there is no right of contribution on the part of the assignor, and in proper cases a further indemnity from the assignor in the event of the assignee being called upon to pay the whole or any part of the mortgage debt. Such a clause would clearly bring the transaction within the principles of the two cases above mentioned which appear to have been accepted by the Court of Appeal.

Stamp duty—series of transactions.—In *Att.-Gen.* v. *Cohen*, [1937] 1 All E. R. 27, the question was again raised concerning what will constitute a series of transactions so as to exclude the lower rate of stamp duty. In this case six lots of houses were put up for sale and each lot was purchased by the same purchaser, four of them for less than £500 each. Separate contracts were signed and separate conveyances executed for each lot, and it was contended for the Crown that all conveyances should bear the full rate of stamp duty. The Court of Appeal held (Romer, L.J., dissenting) that these conveyances did not constitute a "series of transactions" so as to attract the higher rate of duty, where in fact Romer, L.J., based his dissenting judgment (see p. 35) upon the opinion that though there were separate contracts there was a series of transactions, whereas the other learned Judges (Slesser and Greene, L.JJ.) seemed to be moved rather by the fact that they were properly separate contracts and not part of a larger transaction, and that it was left for the parties honestly to determine whether or not a larger transaction had been split up to avoid stamp duty. It is thought that the fact that the contracts were the result of separate bids at a public auction was a material fact in arriving at a decision that really the contracts were not a series of transactions in effect constituting one transaction, since clearly each lot could have been bought by another purchaser although all the purchases were made on one day and in one place. It is suggested that this decision can hardly have reference to transactions outside the auction room. So, for example, if there were a series of purchases of separate houses made not on the same day but in close proximity it would be a question of fact whether the purchases represented a series of transactions forming part of a larger transaction and were in truth separate transactions arrived at independently of the earlier purchases (and see *per* Greene, L.J., at pp. 38 and 39).

Implied grant—nuisance.—In *Thomas* v. *Lewis*, [1937] All E. R. 137, the plaintiff owned a parcel of land and leased an adjoining parcel on a yearly tenancy from the defendant. The land was used for pasture. The defendant at the time of making the letting had been carrying on a neighbouring quarry and continued to do so. The plaintiff complained that the defendant was causing a nuisance by his method of quarrying which included carting stones both upon the land let by the defendant and the land owned by the plaintiff. On behalf of the defendant it was argued that at the time of the letting it was understood that he should continue to work his quarry as he had done and that this constituted an implied grant to commit the nuisance of which complaint was made. Farwell, J., held, following *Vanderpant* v. *Mayfair Hotel*, [1930] 1 Ch., at pp. 162, 163, that with regard to the land let the plaintiff had no right to complain unless he could prove that the quarry was worked improperly or not in accordance with his practice at the time of the agreement to let, citing *Lyttelton Times Co.* v. *Warners*, [1907] A. C. 476. He also held, however, that it was much more difficult to imply any grant with regard to the plaintiff's own land and on the facts of the case held that nuisance had been committed.

It may be suggested here that although the word grant as well as the word agreement is used by the learned Judge the case before him lay in nuisance, and it must not be presumed that his lordship meant to suggest that the implied agreement so constituted would necessarily constitute an easement which might be enforceable against an assignee of the term. It is doubtful whether so indefinite a right could constitute an easement. Whether an agreement could imply a covenant which would be binding upon an assignee is perhaps a rather different problem. In all these cases it is largely a question of fact depending upon the precise circumstances and no decision can be carried very far.

Restrictive covenants — modification. — Re Spencer's Flats, [1937] 1 Ch. 86, is of interest, because first it lays down that delay does not prevent a claim for compensation for infringement of a restrictive covenant, and secondly, that the arbitrator, to whom application is made for modification, should not *semble* decide upon enforceability but adjourn the matter for decision by the Court. A company acquired a house which was one of several subject to restrictive covenants. In breach of this covenant the company pulled down the house and built flats. Subsequently another of

the houses was acquired and the purchaser applied for a modification of the covenant under the Law of Property Act, 1925, s. 84, in order to build flats. The arbitrator permitted this modification on terms of paying compensation. Consequently, the other householders threatened actions against the first company, and the company applied to the arbitrator under section 84 who awarded compensation. Clauson, J., held that though more than a year had elapsed between the claim and the commencement of the building this was not sufficient to wipe out any claim by the persons entitled to compensation and that there was sufficient evidence to establish loss. He also indicated, as mentioned above, that questions of enforceability should be referred to the Court under rule 9 of the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933.

Trustees—duty to transfer to beneficiary absolutely entitled.—In *Re Sandeman's Will Trusts*, [1937] 1 All E. R. 368, in the events which had happened the residuary estate had vested in the plaintiffs absolutely as to one-half and as to the other half upon certain trusts for the testator's daughter. The will contained a direction that certain shares should not be sold by the trustees unless they considered it absolutely necessary, and authorised the trustees to retain the shares as long as they thought fit. The trustees were unwilling to divide the shares since as they stood the trustees could pass an ordinary though not a special resolution. Clauson, J., held that the plaintiffs were entitled to have the estate divided in half including a half of the shares to be transferred. He gave as his reason that *prima facie* beneficiaries absolutely entitled had a right to the transfer into their own name of their share of the property. This principle was subject to the exception dealt with in *Re Marshall*, [1914] 1 Ch. 192, that the Court will order otherwise where there is good ground to the contrary, but his lordship was unable to find either in the will or the surrounding circumstances at the date of application any such ground.

Statutory power of maintenance—contrary intention.—*Re Turner's Will Trusts*, [1937] 1 Ch. 15, disapproves *Re Spencer*, [1935] Ch. 533 and *Re Ricarde-Seaver's Will Trusts*, [1936] W. N. 146, in which it had been held that section 31 (1) (ii) of the Trustee Act, 1925, providing that the income from a contingent interest postponed to an age beyond twenty-one could not be varied by a

contrary intention expressed in the instrument creating the interest. By his will a testator bequeathed one-fifth of his residue to such children of his late son as should attain twenty-eight years and in the meantime directed the trustees to apply the income, or such of it as they saw fit, of any presumptive share for maintenance. One such child attained twenty-one but died before attaining the age of twenty-eight. The question was whether his estate was entitled to the income accumulated during his life after attaining twenty-one. The Court held that the direction only to apply certain income if they saw fit excluded by indicating a contrary intention the payment of the income to the beneficiary contingently entitled. The reasoning of the Court, where judgment was delivered by Romer, L.J., was that the statutory direction was a power and not imperative by virtue of the operation of section 69 of the Trustee Act, 1925, taken in conjunction with the history of the legislation leading up to section 31 (1) (ii).

In practice this will require careful consideration in the drafting of wills and other instruments in which the age of vesting is frequently postponed beyond the age of twenty-one. If no provision is made for intermediate income after attaining a majority it would appear that the income must be paid to and form part of the estate of the person so contingently entitled. On the other hand a clause directing the income or some part thereof to be paid to the beneficiary pending vesting would presumably constitute a contrary intention and exclude the application of section 31 (1) (ii), with the result that surplus income would apparently be accumulated to form part of the capital of the fund. If it is intended that the beneficiary should treat such income otherwise than as capital on attaining the age of vesting or otherwise this should be clearly stated.

Legitimation per subsequens matrimonium—*right to take under a disposition.*—By the effect of the Legitimacy Act, 1926, s. 1, any person born out of wedlock will be legitimated by the subsequent marriage of the parents provided that at the date of birth the parents were able to marry. The legitimation, however, dates from the time of marriage and not birth. In order that a legitimated person may take under a disposition in favour of " children ", however, the legitimation must normally have occurred at the date when the disposition took effect. Subsequent legitimation will not bring the person within the class of children although the legitimated person may have been *in esse* at the date when the disposition took effect. This principle has clearly been enunciated by

Farwell, J., in *Re Hepworth*, [1936] Ch. 750, where the parent took a life interest under the will of his father, who died in 1918, with remainder over to his children. The legitimated person was born in 1915 and her parents married within the same year, but her legitimation could only take effect in 1926 under the Act. Consequently, although her father only died in 1928 she was entitled to no interest under her grandfather's will. The gift over in favour of children took effect on the death of the grandfather and not on the death of the father.

Charitable intention—cy-près. — The problem of a general charitable intention is constantly arising and is not easy of solution because it must depend in a large measure upon the particular facts. In *Re Knox*, [1937] 1 Ch. 109, a testatrix gave her residuary personal estate to "the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary, the Newcastle-upon-Tyne Nursing Home, and Doctor Barnardo's Homes, London" in equal shares. There was no institution of the description "Newcastle-upon-Tyne Nursing Home", and the nearest of like name was the privately owned "Newcastle Private Hospital and Nurses' Home". Luxmoore, J., held that there was no institution that satisfied the testatrix's description, and that, though a nursing home need not necessarily be a charitable object, the fact that the testatrix was dealing with the residue of her estate in equal shares for objects three of which were charitable was sufficient to display a general charitable intention. Consequently, the remaining one-fourth share must be dealt with by a scheme under the *cy-près* doctrine.

Will—construction—bequest in blank.—Re Messenger's Estate, [1937] 1 All E. R. 355, should be noted though its peculiar facts make it improbable that the principle will be readily applied. By his will a testator, who used a printed form, appointed E. A. C. to be his executor and, after directing payment of the debts and funeral expenses, followed the printed matter "I give and bequeath" with a blank and then the words "to my daughter E. A. C." The will was duly executed and attested. Clauson, J., applied the words of Lord Esher in *Re Harrison* (1885), 30 Ch. D. 390, at p. 393: "There is one rule of construction which to my mind is a golden rule, *viz.*, that where a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce." The learned Judge said that he obviously

intended to dispose of his property or the will was a solemn farce, and he obviously intended to benefit E. A. C. He, therefore, held that the will passed the whole of the deceased's property to E. A. C., citing as his authority the judgment of Bacon, V.-C., in *Re Bassett's Estate* (1872), L. R. 14 Eq. 54, and the Australian case of *Fell* v. *Fell* (1922), 31 C. L. R. 268.

This case follows just the opposite line to *Re Skeats*, [1936] Ch. 683, where the appointment of the executrix was followed by a complete blank after the words " I give and bequeath unto " and Clauson, J., held that the executrix took only as a trustee for the persons entitled under intestacy. Similarly, the case shows great liberality compared with most of those governing the use of colloquial words, such as " effects ", when employed in homedrawn wills and construed restrictively. So " money " can mean little else than actual cash in most cases (see *Re Hodgson*, [1936] Ch. 203) though obviously and colloquially it is commonly employed to cover property of all kinds.

Will—construction—money on deposit as " investment ".—In *Re Lewis's Will Trusts*, [1937] 1 Ch. 118, Bennett, J., showed a similar leaning towards a liberal construction as in the case last noted. By his will the testator had bequeathed certain securities or the investments representing the same at his death. Not long before his death the security was redeemed and the amount so paid to the testator was deposited as to a small amount in his deposit account at the bank and the bulk was deposited with the Army and Navy Stores carrying interest. The question was whether the legacy had been adeemed. Bennett, J., held that there was no authority binding on him which determined what was an " investment " and distinguished *Re Price*, [1905] 2 Ch. 55, on the ground that there the context was " pecuniary investments ". The learned Judge then held that the deposits both at the bank and at the Army and Navy Stores constituted investments and that the legacy was not adeemed.

In *Re Price* (*supra*) the testator had bequeathed all his mortgages, debentures, shares " and pecuniary investments " specifically. Subsequently to his will the deceased had put a large sum out of his current account upon deposit at ten days' call. Farwell, J., held that this deposit was not a " pecuniary investment " though the learned Judge admitted that the word investment was used in various ways. His decision seems partly to have turned upon the fact that the specific bequest was on trust to continue in the present

state of investment or to convert in any manner whatever. He pointed out that a testator could hardly have contemplated the continuance in their present state of investment. This clearly distinguishes the deposit at the Army and Navy Stores. At the same time attention should be called to the observations of Farwell, J., that because money bears interest it must not necessarily be regarded as an investment.

Will — construction — application of partial intestacy. — *Re Thornber*, [1936] Ch. 520, noted *ante*, p. 171, was upheld by the Court of Appeal as reported in [1937] 1 Ch. 29. The facts were that a testator, subject to annuities to his mother and his widow, bequeathed his residuary estate upon trust for the income to be accumulated during the life of his widow or twenty-one years whichever was the shorter and then upon trusts for his children. The testator died without issue and the widow successfully contended that the direction to accumulate failed. The Court of Appeal held that as the beneficial interests in the accumulated income and the capital failed the property must be treated as if it passed on intestacy. That is to say, that a direction in a will which operates only in connection with a lapsed bequest must itself fail and not operate to exclude the ordinary rules for intestate succession unless there is an express contrary intention shown in the will.

Will—construction—" belongings ".—In *Re Mills' Will Trusts*, [1936] 3 All E. R. 142, by her will a testatrix gave to her daughter " All my home and personal belongings except the piano and that is for my grandson—all insurances to go to my daughter ". The question was whether the whole residuary estate, which was exclusively pure personalty, should pass to the daughter. Bennett, J., held that the whole residue passed on the ground that Eve, J., had held in *Re Bradfield*, [1914] W. N. 423, that " belongings " had the primary meaning of property and that there was no contrary intention. The only contrary intention could be found in the use of the words " home " and " personal " and in the fact of the specific bequest of insurances. The Court leans against intestacy and consequently the learned Judge held that the residue passed.

It is thought that " belongings " can normally only be construed to mean property in the sense of personal property, but as with all questions on will construction it must depend to some extent upon the facts of the case.

2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., of Gray's Inn, Barrister-at-Law.

The Exception of Fair Wear and Tear.—A recent decision of the Court of Appeal (consisting of Slesser and Scott, L.JJ., and Farwell, J.) may prove to have removed much of the doubt and conflict of authority which hitherto has always existed with regard to the precise meaning of the common exception of fair wear and tear in the repairing covenant of a lease. Previous authorities have now been reviewed and a clear rule of construction laid down by the Court of Appeal in *Taylor* v. *Webb* (1937), 53 T. L. R. 377; 81 S. J. 137; 1 All E. R. 590. In this case a very close examination was made into the meaning to be placed upon those words and, unless the House of Lords ever expresses a different opinion, the case will provide property lawyers with an unambiguous and authoritative interpretation of the clause.

Many of the previous decisions lay down in broad, general terms what is the construction to be placed upon the words. Thus in *Terrell* v. *Murray* (1901), 17 T. L. R. 570, it was said that the exception of damage caused by fair or reasonable wear and tear excludes dilapidations caused by friction of air, by exposure, and by ordinary use. So the painting of outside woodwork, repointing brickwork, and repairing a kitchen floor affected by dry rot, were held to be excluded by the exception. This decision would appear to be perfectly correct and in no way impaired by the recent judgment of the Court of Appeal. Some of the principal difficulties which arise in practice are not, however, met satisfactorily by any of the cases prior to *Taylor* v. *Webb*. It is comparatively simple to decide what is fair wear and tear in the case of dilapidations caused by the tenant's user of the premises. It is not so easy in all cases to decide what is fair wear and tear where the dilapidations are caused by the action of the elements. Defects develop in the first place as a result of the action of wind and weather, but the real cause of the substantial damage which ultimately ensues is frequently the fact that steps are not taken to remedy the comparatively small defect brought about by the action of the elements, so that small dilapidations develop into large ones. Various attempts have been made to decide what in such circumstances is the effect of a repairing covenant with an exception of fair wear and tear. To take one example, in *Miller* v. *Burt* (1918), 63 S. J. 117, the principle was laid down that while the tenant was responsible for repairs necessary to maintain the premises in the

same state as when he took them, yet if wind and weather had a greater effect on the premises having regard to their character than if the premises had been sound, the tenant was not bound so to repair as to meet the extra effect of the dilapidations so caused. This rule is, in the light of *Taylor* v. *Webb*, unnecessarily involved. In *Haskell* v. *Marlow*, [1928] 2 K. B. 45; 97 L. J. K. B. 311, it was held that to bring dilapidations within the protection of the exception two things must be shown : first, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they were reasonable in amount, having regard to the terms of the contract to repair and the other circumstances of the case. The first of these requirements has now been approved by the Court of Appeal; the second has been overruled and held to be an immaterial consideration.

In *Taylor* v. *Webb* a landlord covenanted in an underlease to keep the outside walls and roofs in such repair as he was required by the headlease to keep them in. The landlord's obligation as tenant under the headlease was to keep the premises " in good and tenantable repair, destruction or damage by fire and fair wear and tear excepted ". The skylight and roof fell into disrepair as a result solely of the natural causes of wind and weather and natural decay. The landlord did nothing to arrest this process of decay, and in due course the premises became uninhabitable. In an action by the landlord for rent, the tenant counterclaimed for damages for breach of covenant to repair. No question arose as to fairness of user, the sole question being what was the landlord's liability under his covenant in respect of the damage described. The Court of Appeal held that fair or reasonable wear and tear meant, in relation to dilapidations due to natural decay and the elements, the normal action of the elements, without any qualification. In this case the dilapidations were caused solely by the normal action of the elements, and so they came directly within the exception which excluded the landlord from the obligation to repair.

Now although the dilapidations were caused by the normal action of the elements, most of the damage which ensued could have been avoided had steps been taken within a reasonable time to arrest the existing and prevent further decay. On precisely similar facts in *Haskell* v. *Marlow* Salter, J., had decided that such words as " fair " and " reasonable " qualify both the destructive agencies and the dilapidation, so that the amount of the dilapidation permitted to occur could, of itself, make unreasonable what would otherwise be fair or reasonable wear and tear. In the same case

Talbot, J., took the view that the exception of disrepair due to fair wear and tear must be construed as limited to what is directly due to wear and tear, and does not mean that where a defect proceeds originally from reasonable wear and tear the covenantor is released from his obligation as to everything which it may be possible to trace ultimately to that defect. According to Talbot, J., he must do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

The Court of Appeal has rejected both these lines of argument. The words of Slesser, L.J., may be quoted to illustrate the view which was taken by all three Judges of the Court: "In so far as it is suggested that the amount of dilapidation may be said to make wear and tear, which would otherwise be reasonable or fair, unreasonable and unfair, I am unable with respect to agree"; and, "I am unable to see how, if he was under no obligation to repair, he can be held responsible for the consequential damage which flowed from an obligation to repair walls and roofs, when that obligation was not his". The Court of Appeal has therefore placed a very wide construction upon the exception of fair wear and tear, defining the two classes of disrepair which it excepts from the repairing obligation as follows:

(a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather; and

(b) that brought about by the tenant, and other persons on the premises with his consent, in the course of fair or reasonable user of the premises for the purposes for which they were let.

The disrepair excluded under the first head is considerably wider in scope than many had supposed. All results flowing from the normal operation of natural causes are, it is laid down, included in the exception, irrespective of the reasonableness or unreasonableness of allowing the natural causes to continue producing those results unchecked.

This is a decision of wide and far-reaching importance which well merits the careful consideration of all property lawyers. Conveyancers, before using the time-honoured phrase, will have to consider whether, as interpreted by the Court of Appeal, it means exactly what they intend to state. It is thought that conveyancers have not intended nearly so much to be comprised within the exception as the Court of Appeal has now held to be caught by it. Sometimes, indeed, the view has been expressed that the words "fair wear and tear excepted" excluded little or nothing from the repairing obligation. The Court of Appeal arrived at its

construction by a careful examination of the strict meaning of the words used; perhaps the observation may respectfully be made that little attention appears to have been paid to the question of what the parties really had in mind in using that condensed and elliptical phrase. It will be interesting to see whether the opinion of the House of Lords is ever sought on this vital question of construction which must affect countless numbers of leases.

Meaning of the expression "Underlease of the demised premises or any part thereof"—covenant to produce underleases for registration.—The case of *Portman* v. *J. Lyons & Co., Ltd.* (1936), 53 T. L. R. 148; 3 All E. R. 819, raised an interesting question of construction which has not before been the subject of a reported case. The defendants were lessees of premises from the plaintiff for a term of eighty-eight and three-quarter years. By their lease they covenanted that they would "within two calendar months next after the execution of every assignment or underlease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding seven years . . .) of the demised premises or any part thereof produce or cause to be produced such assignment or underlease or the counterpart thereof . . . to the lessor or his successors in title for the time being . . ." and that they would "permit a docket or minute of every such assignment or underlease . . . to be made and retained by or for the use of the lessor or his successors in title. . . ." The defendants sub-demised the entire premises to a trustee company, which in turn sub-let a portion of the demised premises back to the defendants. The defendants objected to produce this sub-lease to the lessor on the ground that the covenant referred to above did not apply to a sub-underlease. They contended that the expression "demised premises" meant the physical property tied up by the terms and conditions of the original demise, and that the physical object could not be separated from the legal interest. Thus an assignment or underlease of the demised premises would mean either an assignment of the term created by the original lease or an underlease derived out of that term, and would not extend to a sub-lease derived not out of that term but out of a sub-lease.

Bennett, J., agreed, however, with the construction placed upon the words by the plaintiffs, namely, that the covenant required registration of every underlease (with the exception specified) relating to any part of the demised property, regardless of who the parties to the document might be. This view was strengthened

in the particular case by the words of exception within the brackets, which excepted, *inter alia*, assignments of certain specified lettings of flats. These would in the circumstances of the case necessarily be assignments of sub-lettings and so would fall outside the defendants' definition of "every assignment or underlease of the demised premises or any part thereof". In the result there would be excepted something which was not caught by the principal clause, and that clearly could not be the intention. The case was not, however, decided merely upon this point, and it may be stated as a general principle that covenants in this form (which for the most part follows common practice) to produce for registration underleases of the demised premises or any part thereof apply to all underleases relating to any part of the premises demised whether or not they are derived immediately out of the head term.

Agreement to purchase leaseholds—what amounts to a parting with the possession of the demised premises.—Questions of the construction of an agreement and an interesting point of law as to what amounts to a breach of a covenant not to part with the possession of demised premises arose in *Pincott* v. *Moorstons, Ltd.*, [1937] 1 All E. R. 513; 81 S. J. 136; 156 L. T. 139. The vendors were assignees of a lease which contained a covenant not to assign, transfer, underlet or part with the possession of the demised premises, or any part thereof, without the previous consent in writing of the landlords, etc. The purchaser paid a deposit, and it was a term of the agreement that the vendors should use their best endeavours to obtain the landlord's consent to the assignment, and that if such consent could not conveniently be obtained the vendors would, at the option of the purchaser, procure a declaration of trust of the premises in favour of the purchaser, or otherwise deal with the same as she should direct. The vendors failed to obtain the landlord's consent. The purchaser informed the vendors that she did not intend to exercise her option and brought an action for the return of her deposit. The Court of Appeal, affirming Branson, J., held that the proper construction of the clause of the agreement was that if the landlord's consent to the proposed assignment could not conveniently be obtained the vendors would give and the purchaser would take, in lieu of an assignment, at her option, either (a) a declaration of trust, or (b) such other means of giving the purchaser a right to use the premises for the purpose for which she was taking them (the vendors retaining the legal possession) as she should direct, *e.g.*, by the grant of a licence. As

the purchaser refused to have the contract carried out either in manner (a) or in manner (b), it was she who was in default and the vendors were entitled to retain the deposit.

It was argued that this must be a misconstruction of the clause, because it would amount to a parting with the possession of the demised premises without the consent of the landlord, and so would involve a forfeiture. The Court of Appeal held that this would not be so, citing a number of authorities. In *Jackson* v. *Symons*, [1923] 1 Ch. 373; 92 L. J. Ch. 161, Romer, L.J. (then Romer, J.), held, citing the earlier case of *Peebles* v. *Crosthwaite* (1897), 13 T. L. R. 198, that a lessee who retains legal possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises. This principle was approved by the House of Lords in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.*, [1921] 2 A. C. 465; 90 L. J. K. B. 1252. In *Chaplin* v. *Smith*, [1926] 1 K. B. 198; 95 L. J. K. B. 449, C. A., it was again laid down (by the Court of Appeal) that a lessee who has covenanted not to part with the possession of demised premises does not commit a breach of the covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself. In that case the lessee permitted a company to carry on a garage business on the demised premises. The company had its name over the premises, and appeared in the valuation list as the occupier. That case shows clearly, therefore, that there would have been no difficulty in the way of giving the purchaser the entire use of the premises, without the risk of involving a forfeiture.

Demolition under dangerous structure notice—whether eviction by title paramount.—In *Popular Catering Association, Ltd* v. *Romagnoli*, [1937] 1 All E. R. 167, the defendant's repairing obligation as tenant of certain premises demised to him by the plaintiffs was qualified by a clause excluding him from responsibility for settlements in the structure or for repairs required through age or decay (unless occasioned by the negligence of the lessee). There was the usual qualified covenant for quiet enjoyment, limited to "any interruption by the lessor or any person claiming by through under or in trust for him".

The London County Council served several dangerous structure notices in respect of the property both on the defendant and on the plaintiffs' superior landlords, the freeholders. The defendant forwarded the notices to the plaintiffs, but they were not complied

with. Demolition orders were obtained. Eventually the county council entered the premises and under the powers conferred by section 133 of the London Building Act, 1930, carried out the work necessary to comply with the dangerous structure notices. In the course of such work they demolished two storeys of the building. In an action for arrears of rent, the defendant pleaded that he had been evicted from part of the premises by the London County Council on the default of the plaintiffs, and that such eviction constituted eviction by title paramount. Alternatively he pleaded that the eviction was due to the act or default of the plaintiffs in permitting the premises to become dangerous, and/or in omitting to remedy the dangerous condition of the premises, and/or in failing in breach of statutory duty to comply with the dangerous structure notices and demolition orders, and he pleaded that the lease was frustrated. He counterclaimed for an apportionment and reduction of the rent payable and damages for breach of the plaintiffs' covenant for quiet enjoyment.

It was held by Greaves-Lord, J., that there was no eviction by title paramount, that there was no frustration of the lease, and that there had been no breach of the plaintiffs' covenant for quiet enjoyment; the defendant was therefore liable for the full amount of the rent.

The judgment in the case is short and no authorities are cited. There is, however, no lack of authority as to what constitutes eviction by title paramount. In *Neale* v. *Mackenzie* (1836), 1 M. & W. 747, at p. 759, Lord Denman defined it as "eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence". An example is provided by the title of a superior lessor to re-enter on the demised premises upon breach of condition: see, for instance, *Hopcraft* v. *Keys* (1833), 9 Bing. 613; 2 Moo. & S. 760. Another illustration is found in *Doe* d. *Vaughan* v. *Meyler* (1814), 2 M. & S. 276, where a tenant for life granted a lease under a power but the lease was not well executed under the power, so that on the death of the tenant for life the reversioner claimed possession from the lessee under a title paramount. The essential element of an eviction by title paramount is that there is a challenge to the title under which the occupant holds possession. This essential element is entirely absent when the London County Council merely enter in order to carry out works necessary to comply with dangerous structure notices, and then leave the tenant to his enjoyment of what remains of the premises after doing those works.

The cases of eviction of tenants by the military authorities under Defence of the Realm Regulations are very much in point,

though the facts of the case now under discussion are if anything even stronger against there being any claim of title paramount than the cases of eviction by military authorities. In *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K. B. 680, two flats were requisitioned for military purposes; Lord Reading, C.J., held that the tenant had not been evicted by title paramount so as to suspend the tenancy or relieve from liability for rent. There was no determination of the estate created by the lease. This case was approved by the House of Lords in *Matthey* v. *Curling*, [1922] 2 A. C. 180, where again premises were taken by the military authorities under Defence of the Realm Regulations. Lord Buckmaster, at p. 227, makes it clear why this is not eviction by title paramount, stating the principle in these words: "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent". Lord Atkinson's observation at p. 232 is particularly applicable to the case now under consideration: "I cannot find any case in which the rent reserved by a lease was apportioned simply because the lessee was deprived of the use and enjoyment of a portion of the demised premises, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such a result."

These authorities make it clear that the action of the county council was not an eviction by title paramount. Was there, however, a frustration of the lease? Again, the judgment cites no authorities, but the decided cases definitely support the view taken by the learned Judge. In *London and Northern Estates Co.* v. *Schlesinger*, [1916] 1 K. B. 20, the tenant of a flat became an alien enemy and so was prohibited from residing in the area in which the flat was situated. He contended that the contract of tenancy was frustrated and that the obligation to pay rent was discharged. In fact he was unable to prove that his personal residence in the flat was the foundation of the contract, but Lush, J., also placed his decision upon the wider ground that a term of years was created by the contract and vested in the tenant, and the Order in Council which disqualified him from personally residing in the flat did not affect the chattel interest which was vested in him by virtue of the tenancy agreement. This is in accordance with the rule that a lease continues to exist notwithstanding the destruction of the demised premises by fire or otherwise. In *Belfour* v. *Weston* (1786), 1 T. R. 310, a lessee who had covenanted to pay rent, and to repair with express exception of casualties by fire, was held liable on the

covenant for rent, though the premises were not rebuilt by the lessor after notice. Demolition by a local authority under statutory powers is no more a frustration of the lease than is destruction by fire. In both cases the lease still subsists with regard to what is left of the demised premises and the land upon which they stand, and if he had wished to the tenant could have provided in the lease against the contingency of having to pay the stipulated rent for buildings which have been demolished or burnt down.

It does not appear from the report whether there was any argument upon the contention that the eviction was due to the plaintiff's default in permitting the premises to become dangerous or in omitting to remedy their dangerous condition or in failing to comply with the statutory duty created by the notices; it does not, however, appear that there was any covenant by the landlord rendering him liable in respect of structural repairs.

Lastly, the defendant counterclaimed on the ground that there was a breach of the plaintiff's covenant for quiet enjoyment. This claim is really by way of an alternative to the plea of eviction by title paramount, for the usual qualified covenant for quiet enjoyment does not covenant against an eviction by title paramount: see *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, C. A., *per* Lord Esher, M.R., at p. 684. The principle is, however, clear that no action for breach of the usual qualified covenant lies in respect of acts done by a person claiming not by, through or under, but *against* the lessor: *Stanley* v. *Hayes* (1842), 3 Q. B. 105; 11 L. J. Q. B. 176 (distress for previous arrears of land tax due from the lessor); *Kelly* v. *Rogers*, [1892] 1 Q. B. 910; 61 L. J. Q. B. 604, C. A. (ejectment by the head lessor for breach of covenant by the immediate lessor). The demolition of the premises by the local authority under statutory powers clearly falls within the same principle, being an act done not by, through or under, but *against* the lessor. In *Williams* v. *Gabriel*, [1906] 1 K. B. 155; 75 L. J. K. B. 149, Bray, J., held that the demolition of the demised premises by an assignee of the reversion under a demolition order made under the London Building Acts afforded no ground of action for breach of the covenant for quiet enjoyment against the personal representatives of the original lessor. In the present case, where the demolition was carried out by the local authority, it is even clearer that no action lay against the lessor for breach of his covenant.

3. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[Note.—The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Schedule A—who is the "occupier"?—The leading case of *Tennant* v. *Smith*, [1892] A. C. 150, decided that a bank manager who as part of his duty resided on the bank's premises was not an occupier for the purposes of Schedule A, and that for those purposes the bank house, including the residential quarters, was in the occupation of the bank and not of its servant, the manager. An application of the same principle is to be found in the recent decision of the Court of Appeal in *Reed* v. *Cattermole*, [1937] All E. R. 541. The question which there arose was with regard to the position of a Methodist minister who was provided by his church with a house in which he was under an obligation to reside. It was held by the Court of Appeal, affirming the decision of Lawrence, J., and applying the principles propounded in *Tennant* v. *Smith*, that the minister was not for tax purposes the occupier of the residence, and that it made no difference that, whereas in the bank manager's case the residential quarters were merely a part of a larger building forming the bank premises, the minister's manse was a separate house. The minister had in fact been entered in the Schedule A assessment-book as occupier, but the entry was one to which he was not a party and which had been made without his knowledge, and it was admitted by the Crown that nothing turned upon it for the purposes of the appeal. *Reed* v. *Cattermole* is an important illustration of the distinction between beneficial and representative occupation, the test being, not whether the occupation does or does not carry with it a right to sub-let, but whether the premises are permitted to be occupied by the individual for his own convenience or are required to be occupied by him as part of his duties to his employer.

Reference may here be made to two other decisions of fairly recent date with regard to the meaning of "occupation" for the purposes of Schedule A. In *Bertram* v. *Wightman* (1936), 15 A. T. C. 453, the facts were as follows : B was until a certain date in actual occupation of a house and forty acres of surrounding land. He then vacated the property and put it in the hands of agents for sale. While the property was awaiting a purchaser, exemption

of tax in respect of the unoccupied house was, of course, claimable under rule 4 of No. VII of Schedule A. But did B remain chargeable in respect of the unoccupied land? It was decided that he did. Rule 2 of No. VII of Schedule A provides that " every person having the use of any lands or tenements shall be deemed to be the occupier thereof ". Rule 4 provides (subject to the exemption in favour of unoccupied houses) that " tax under this Schedule shall be charged on all lands, tenements and hereditaments, whether occupied at the time of assessment or not ". If in Rule 2 the words " having the use " connoted actual occupation, there would be, on the face of it, a conflict between rules 2 and 4. Accordingly, it was held by Lawrence, J., that the true construction of rule 2 is that, whether in actual occupation or not, a person is to be *deemed* to be the occupier of property if he is entitled to the beneficial use of it. B had vacated the land, but he remained entitled as owner to use it if he chose to do so. Hence, contrary to the view hitherto held by so eminent an authority as Konstam on Income Tax (see 7th ed., pp. 50—52), B was held to be chargeable to tax under Schedule A (and also Schedule B) as occupier, notwithstanding that there was no occupier in fact.

One of B's contentions was that the law as to what constitutes occupation is the same in relation to income tax as in relation to rating—a proposition which seems, at first sight, to be supported by a well-known passage in the judgment of Scrutton, L.J., in *Back* v. *Daniels*, 9 T. C. 183. Lawrence, J., however, took the view that Scrutton, L.J.'s observations do not go to this length, and that where there is no occupation for rating purposes it does not follow that there can be no person who is to be deemed to be the occupier for the purposes of Schedules A and B.

One further decision which may be noted in this connection is that in *Joly* v. *Pinhoe Nurseries, Ltd.* (1936), 15 A. T. C. 273. The assessment appealed against was under Schedule B, but the decision was applicable to Schedule A, since the effect of Rule 4 of Schedule B is that the person chargeable under Schedule B is to be ascertained in accordance with the Rules of Schedule A. X had conveyed certain lands to a company, which had entered into occupation. A receiving order was subsequently made against X, and the trustee in bankruptcy obtained an order setting aside all dispositions by X in favour of the company. The trustee then took possession of the lands, which he later sold to the company. It was contended by the company that inasmuch as, by virtue of section 37 of the Bankruptcy Act, 1914, the trustee's title related back to the time of the act of bankruptcy, and the trustee had elected to treat the company as his agents, it followed that the

trustee and not the company must be deemed to have been in occupation up to the time when the lands were sold to the company by the trustee. It was held by Lawrence, J., that the doctrine of relation back under the Bankruptcy Act has no relevance to the determination of the question who is the occupier for the purposes of tax under Schedule A or B. Occupation is a question of fact in the sense that the occupier is to be deemed to be the person who has in fact for the time being the beneficial use of the property or —to put it more precisely, having regard to the decision in *Bertram* v. *Wightman* (see note above)—the person who is in fact for the time being entitled to the beneficial use of the property.

Rule 23—*agreement not to deduct tax.*—In *Jervis* v. *Howle and Talke Colliery Co., Ltd.* (1936), 15 A. T. C. 529, X, in leasing certain facilities for working coal from Y, had agreed to pay a royalty of 3d. per ton, " such royalty to be paid free of tax ". X paid the royalties to Y in full but subsequently assigned his rights to Z, Ltd., which claimed, notwithstanding the words " free of tax ", to be entitled to deduct tax by reason of Rule 23 (2) of the General Rules, which provides that every agreement for the payment without deduction of tax of rent, interest or any other annual sum, being a payment from which tax is authorised by the Income Tax Acts to be deducted by the payer, shall be void. X thereupon brought an action for rectification of the agreement by substituting for the words " 3d. per ton free of tax " the words " of such an amount as after deduction of income tax at the standard rate . . . shall leave a sum of 3d. per ton ". Clauson, J., found as a fact that this alteration would cause the agreement to represent the intention of both parties and, referring to the well-known decision in *Burroughs* v. *Abbott*, [1922] 1 Ch. 86, held that he was bound to direct the rectification as asked. In *Re Gretton's Indenture*, [1923] 1 Ch. 77, Romer, J. (as he then was) said, with reference to the words of section 103 (2) of the 1842 Act, from which those of Rule 23 (2) are derived, that " it is not, perhaps, easy to suggest any explanation for their insertion that is completely satisfactory ". The real point of Rule 23 (2) still remains a matter of speculation.

---

4. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

Estate duty in respect of settled property.—The leading case of *Cowley* v. *C. I. R.*, [1899] A. C. 198, lays down the principle that where a tenant for life of settled property is succeeded on his death by another tenant for life, the property which passes is not the life interest but the settled property itself. The settled property actually "passes" under section 1 of the Finance Act, 1894, and the case is not one of property "deemed to pass" by reference to the cesser of an interest under section 2 (1) (b).

This principle was applied by the House of Lords in somewhat peculiar circumstances in *Christie and Others* v. *Lord Advocate*, [1936] A. C. 569. The material facts were as follows. A testator had directed that after certain payments had been made out of the income of his residuary estate, one-tenth of the remaining income should be paid to his daughter, X, during her life. After the death of X her share of the income of the trust fund was to be paid to or applied for the benefit of her children. But these directions were subject to the proviso that after the death of the testator's widow, Y, no beneficiary other than the testator's sister-in-law should receive more than £600 from the income of the trust fund, and that any surplus income resulting from this limitation should be paid to a certain charity. At X's death Y was living but was seventy-two years of age and in poor health. X's share of the trust income amounted to about £2,800. It was contended by the trustees that in the estate duty valuation allowance must be made for the large reduction which would take effect on Y's death. This contention was rejected by the House of Lords. It was held that there was here a true passing under section 1 of the 1894 Act, and that what passed was not the interest of the life tenant but an aliquot share of the settled property itself. What had, therefore, to be valued under section 7 (5) was not an income for life of £2,800 reducible in certain events to a smaller sum, but a share of the trust fund corresponding to the share of the trust income enjoyed by X at her death.

Incidence of estate duty where legacies payable out of realty.—In the absence of judicial authority before the decision in *Re Thompson*, [1936] Ch. 676, doubts had arisen (see, for example, Dymond on Death Duties (7th ed.), p. 229) as to the incidence

of estate duty where legacies are payable out of an estate including both personalty and realty. Two questions were involved. First, having regard to the provisions of section 34 (3) and of Part II of the First Schedule to the Administration of Estates Act, 1925, was it the case that legacies were no longer to be considered to be payable primarily out of personalty, and out of realty only so far as personalty was insufficient, but must now be considered to be payable out of personalty and realty *pro rata*? Secondly, if this were so, was it the case, nevertheless, that in relation to the incidence of estate duty legacies must still be regarded as payable primarily out of personalty, having regard to section 53 (3) (c) of the 1925 Act, which provides that nothing in the Act shall "alter the incidence of any death duties", and to paragraph 8 (b) of Part II of the First Schedule, which provides that "This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets"? The practical importance of these questions, so far as estate duty is concerned, arises, of course, from the principle that realty bears its own estate duty, so that the burden of estate duty falls upon the legatee to the extent to which the legacy is payable out of realty.

Both the above-mentioned questions were disposed of by Clauson, J., in *Re Thompson*, above, where the personalty was sufficient to pay a substantial part, but not the whole, of the legacies. It was held that nothing in the Administration of Estates Act, 1925, invalidated the rule stated in *Re Boards*, [1895] 1 Ch. 499, that where a testator bequeaths legacies and then bequeaths the residue of his real and personal estate without directing that the legacies shall be paid out of the mixed fund, they are payable primarily out of the personalty. It was further held that, even if it were the case (as it was not) that the rule in *Re Boards* had been altered by the 1925 Act, the safeguarding provisions of that Act with regard to death duties would in any case require that for the purpose of determining the incidence of estate duty the old rule must be considered to be still in force.

Partnership reserves passing to continuing partners.—In *Att.-Gen.* v. *Ralli and Others* (1936), 15 A. T. C. 523, the Crown unsuccessfully claimed estate duty in respect of an interest in the cash reserves of a trading partnership constituted by agreements under which, on the death or retirement of a partner, his interest in the cash reserves passed to the continuing partners. X, who

had been one of the partners, retired a few weeks before his death. It was contended on behalf of the Crown that his interest in the cash reserves must be deemed to pass under section 2 (1) (c) of the Finance Act, 1894, as a gift made within the three years' period, the argument being that X's notice of retirement amounted to a gift to the other partners of his interest in the reserves. This contention was rejected by Lawrence, J., on the ground that what was here in question was not a gift but a transaction flowing from the arrangements embodied in the partnership agreements, these being ordinary commercial arrangements to which the partners mutually agreed for good consideration.

The Crown made an alternative claim under section 2 (1) (b) of the 1894 Act (interest ceasing), read together with section 11 of the Finance Act, 1900. The effect of section 11 of the 1900 Act, so far as material, is that where property in which the deceased had an interest "limited to cease on his death" has during his lifetime been surrendered or otherwise disposed of, whether for value or not, to a person entitled to an interest "in remainder or reversion" in such property, the property shall be deemed to pass on the death of the deceased unless the property was surrendered or otherwise disposed of three years before the death and *bona fide* possession was thereupon immediately assumed under the surrender or other disposition and thenceforward retained to the entire exclusion of the deceased. It was contended by the Crown that X's retirement (which took place only a few weeks before his death) constituted a surrender or other disposition of his interest in the reserves to the persons entitled in remainder or reversion, *viz.*, the continuing partners. This contention also was rejected by Lawrence, J. It was held that X had not an estate or interest "limited to cease on the death" of X within the meaning of section 11; his interest was limited to cease on his death or retirement. He did not by his retirement surrender an interest limited to cease on his death; the retirement itself caused his interest to cease without reference to his death. Further, it was held that the continuing partners were not persons entitled to an interest in the reserves "in remainder or reversion". In this connection reference was made to Rowlatt, J.'s observations in *Att.-Gen.* v. *Lane Fox*, [1924] 2 K. B. 498, at p. 507, that where an owner in fee is entitled to an estate subject to an annuity, he is not, within the meaning of section 11 of the 1900 Act, a "person entitled . . . in remainder or reversion", since these words refer to a person who is not in possession and whose estate is a future one. Here the partners held the reserves as joint tenants, and after X's retirement the remaining partners continued to hold the

reserves as joint tenants. Finally, it was held that even assuming that the property passed or was to be deemed to pass on the death of X, liability to estate duty would in any case be excluded by section 3 of the 1894 Act, which provides (*inter alia*) that estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the persons under whose disposition the property passes, if such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit. The partnership arrangements were ordinary commercial arrangements entered into for business reasons, and X, "in agreeing that his interest in the reserves should pass to his partners upon his death or retirement, had received full consideration for that agreement" in money or money's worth within the meaning of section 3.

Accumulations of income by trustees.—The decision of the Court of Appeal, reversing the judgment of Bennett, J., in *Re Turner's Will Trusts*, [1937] 1 Ch. 15, is commented upon elsewhere in this issue under the head of *Statutory power of maintenance*. The decision was directly concerned with the construction of section 31 (1) (ii) of the Trustee Act, 1925, in relation to section 69 (2), but the question before the Court was raised by originating summons for the purpose of determining liability to estate duty. If, notwithstanding the testator's directions, section 31 (1) (ii) had made it obligatory upon the trustees to pay the income to the beneficiary after his attainment of the age of twenty-one, the income which had in fact been accumulated by them would have fallen to be treated as having been income of the beneficiary, and the accumulations would, at his death, have formed part of his estate. The beneficiary having died possessed of a large fortune of his own, the addition to his estate of the amount of the accumulations would have resulted in an increase in the rate at which estate duty was chargeable, and the increase in the amount of estate duty payable on the aggregated estate would, in fact, have exceeded the amount of the accumulations. The effect of the decision of the Court of Appeal was that, the apparently imperative injunctions of section 31 (1) (ii) not being incapable of being modified under section 69 (2) by the expression of a contrary intention, the accumulations in this case were accumulations of income which was not income of the deceased and were not, therefore, to be treated as forming part of his estate. The decision is also of interest from an income tax point of view; if the accumulations did not, at the beneficiary's death, form part of his

estate, it follows that, notwithstanding the provisions of section 31 (1) (ii), the income not paid to him by the trustees in the exercise of their discretion, and accumulated as directed by the will, did not during his lifetime after attaining the age of twenty-one form part of his total income for surtax purposes or, of course, for the purposes of any repayment claim.

CONVEYANCER'S NOTEBOOK.

Official Searches of the Index Map in the Administrative County of Middlesex.—The following announcement has been received from the Land Registry :—

1. The Chief Land Registrar announces a further improvement in the service of the Registry affecting land in the administrative county of Middlesex.

2. Until now an application for an official search of the index map in Middlesex under rule 286 of the Land Registration Rules, 1925, had to be accompanied by a copy of or extract from the ordnance map on the largest scale published together with a fee of 5s.—a procedure somewhat burdensome to solicitors and comparatively expensive. Acting under his general discretion the Chief Land Registrar has now arranged that official searches of the index map in the administrative county of Middlesex to ascertain whether the land is registered or not or whether there are any cautions or priority notices against first registration, shall be made without fee and without a plan, provided that such a description of the land to be searched against on the index map is given (*e.g.* by road number) as will enable the land to be identified thereon. The application for search need be in no special form. It should be made by post and will be answered by return of post.

3. The Chief Land Registrar regrets that a similar service cannot be extended to non-compulsory areas as the Land Registry maps in such areas are not necessarily up-to-date nor are all road names in such areas indexed in the Registry.

Middlesex Registry.—The attention of readers is drawn to the form of application for a copy memorial and rules relating thereto in the Middlesex Registry printed among the precedents on p. 434, *post*.

Registered land—official searches.—The rules governing official searches in respect of registered land have been amended : S. R. & O., 1936, No. 1302/L.32. In rule 1 of the Land Registration Rules, 1930, the word "fifteenth" shall be substituted for the word

"third". This has the effect of extending the period of the priority of applications made by the searcher from two to fourteen days, so that as long as the papers are lodged within fourteen days of the date of the official search no other application can have priority if lodged after the date of the official search. This will prove a considerable boon to country practitioners in particular who wish to lodge their papers by post and for whom the time allowed before amendment was really too short. It may also avoid some of the complications which arise when there is some delay in lodging the Land Certificate by the vendor on sale of part of the land, particularly liable to occur in the case of building estates where the Land Certificate is not permanently lodged at the Registry. It may be in point here to remind those not familiar with Land Registry practice that in order that a transfer may be registered the Land Certificate and any Charge Certificates must be lodged at the Registry before the papers can be received for registration. Where the vendor is disposing of part only of the land the Land Certificate will be lodged by the vendor. If the land is charged the Land Certificate will be retained at the Registry, but the owners of the Charge Certificates must lodge their certificates before the papers will be accepted. This equally applies where the land is to be released from an interest; as, for example, where there is a release of a right of way shown on the Register the Land Certificate of the dominant owner must be lodged. The extended time thus allowed may give an opportunity to put right any oversight in this direction.

THE LIBRARY.

TABLES OF CONVEYANCING SCALE CHARGES INCLUDING LAND REGISTRY SCALES. By T. O. CARR. London: Sweet & Maxwell, 3 Chancery Lane. 1937. pp. iii + 84. Price 6s. net.

Practitioners will always find useful scales that are clearly set out and show exactly the fee to be charged since this saves time and time is money. The scales here are very conveniently arranged and the practitioner can see at a glance the charge to which he is entitled, and he is given the Land Registry Charges

in a parallel column. It might be suggested that in future editions this scale might also add the fee payable to the Registry to avoid reference elsewhere. The book also contains the Fee Orders both for registered and unregistered conveyancing, together with some short notes referring also to decided cases. These notes are very explicit concerning the precise scale to be applied and deal also with such matters as collateral transactions and acting for more than one party. The whole is a most handy volume that can be kept on the table or slipped into a drawer of a desk for convenient reference, and can be heartily recommended for the busy practitioner or his clerks.

THE PUBLIC HEALTH ACT, 1936. Edited with an Introduction, Notes, Incorporated Enactments and Index. By the Hon. DOUGALL MESTON, of Lincoln's Inn, Barrister-at-Law. London : Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1937. pp. lxxxv + 300. Price 30s. net.

This book is substantially a reprint of the statute in *Chitty's Statutes for* 1936 together with an Index and an Introduction of fifty-seven large pages. The Introduction is a guide to the whole Act and is clearly written, with references to the appropriate sections, which by means of cross-headings in large type enable the reader clearly to grasp the general principles of the Act on any topic with which it deals. It is to be regretted that the Index does not refer to the pages in the Introduction because many practitioners not particularly familiar with this branch of the law will find it convenient to study the outline of the matter in the Introduction before turning to the more formidable task of mastering the appropriate sections. Perhaps the most valuable part of the Introduction is the summary (pp. xlix—lxvii) of proceedings before Courts of summary jurisdiction, including offences summarily punishable, appeals to quarter sessions, and applications to Courts of summary jurisdiction to determine certain matters. The large variety of matters that are punishable summarily under this and kindred Acts is a complication of the law on which most, if not all, practitioners are happy to receive any guidance and in the present conditions of modern building for smaller houses affords constant difficulty.

The notes to the section follow the form familiar to all practitioners from the practice of editors of *Chitty's Statutes* for many years, but in the case of legislation so complicated by cross-references and repeals they are particularly valuable to enable the practitioner readily to discover the existing state of the law.